United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,310

AGATHA MENDELSON,

Appellant

v.

JOHN W. MACY, JR.
Chairman, U.S. Civil Service Commission

JAMES WEBB,
Administrator, National Aeronautics and Space Administration

ROBERT C. SEAMANS, JR.,
Associated Administrator, National Aeronautics
and Space Administration,

Appellees

Appeal From the United States District Court
For the District of Columbia

INDEX

[Filed Feb. 5, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AGATHA MENDELSON
1400 Joyce Street
Arlington, Virginia
Plaintiff

v.

JOHN W. MACY, JR., Individually and as Chairman of the United States Civil Service Commission
1900 E Street, N.W.
Washington D. C.

JAMES WEBB, Individually and as Administrator of the National Aeronautics and Space Administration
400 Maryland Avenue, S.W.
Washington, D.C.

ROBERT C. SEAMANS, JR., Individually and as Associate Administrator of the National Aeronautics and Space Administration
400 Maryland Avenue, S.W.
Washington, D.C.
Defendants

Civil Action No. 299-64

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF
(Wrongful Discharge from Government Employment)

The Plaintiff, Agatha Mendelson, alleges as follows:

1. This is a civil suit for a judicial declaration that plaintiff was improperly and illegally discharged from her employment in the Federal Service by the joint action of the defendants, acting both individually and in their capacities as officials of the United States Government.

2. The jurisdiction of this Court arises under Title 28 of the United States Code, Sections 1331, 2201 and 2202.

3. The defendant, John W. Macy, Jr., is the Chairman of the United States Civil Service Commission; the defendant, James Webb, is Administrator of the National Aeronautics and Space Administration; the defendant, Robert C. Seamans, Jr., is Associate Administrator of the National Aeronautics and Space Administration (hereinafter referred to as "NASA").

4. By a letter dated December 5, 1962 Morton Stoller, then a NASA official and now deceased, notified plaintiff of his intention to discharge her from her employment as a Secretary (GS-7) in the NASA Office of Applications. After receiving a written reply from plaintiff, the said Stoller, by a letter dated December 27, 1962 officially discharged plaintiff from her employment, effective January 6, 1963. The bases for this official action, as charged and found by the said Stoller, were that plaintiff had during 1962 (a) deliberately falsified certain time and attendance records, thereby fraudulently obtaining overtime compensation not legally due her and (b) falsified time and attendance records by not reporting annual leave for two days in 1962 when in fact plaintiff had been on leave status. Reciting that such actions were infractions of NASA regulations, the said Stoller concluded in his letter of discharge that . . . it is my decision that you will be separated from the Federal Service . . . in order to promote the efficiency of the Service." but without assigning specific reasons for this conclusion.

5. Thereafter, plaintiff appealed the said Stoller's decision within her employing agency as permitted by NASA regulations. A three-member ad hoc committee conducted a hearing on the appeal over a

four-day period, taking testimony from twelve witnesses covering 646 transcript pages, and receiving a large quantity of exhibits. NASA management adduced evidence of discrepancies, over a nine-month period in 1962, between the overtime reported by plaintiff on her time and attendance cards and certain entries on building guard registers, reflecting plaintiff's presence in the building. It also offered evidence showing that plaintiff had not recorded annual leave for two days when she was in fact on leave. Plaintiff at no time denied the aforesaid discrepancies or failure to report the two days' leave, elaborating instead an affirmative defense to the charges. She submitted evidence showing, inter alia, (a) that over the same nine month interval as aforesaid plaintiff had worked substantial hours of overtime for which she had not made claim for compensation (b) that in failing to report the two days' leave time in 1962 she meant thereby to recoup leave time she had lost in 1961, innocently relying upon the prevailing custom in her previous places of Federal employment and a belief that her immediate NASA superior, Carl Freedman, had at least tacitly acquiesced in such a course of action (c) that she had worked well and diligently for 11 years in the Federal Service and (d) that among her superiors she enjoyed an excellent reputation for her character, devotion to duty, efficiency, enthusiasm and integrity, matters attested to by such character witnesses as Commissioner John S. Patterson of the Federal Maritime Commission, and a former NASA supervisor of the plaintiff; Dr. Morris Tepper, a NASA superior, who testified that, knowing the charges against her, he would still be willing to hire plaintiff as his own secretary; and the said Carl Freedman, plaintiff's immediate superior at the time of her discharge, who testified that he would welcome the continued services of plaintiff as his secretary.

6. The ad hoc committee unanimously found that the plaintiff had in fact worked a substantial number of overtime hours without claiming compensation therefor; and that, while not all of her erroneous overtime reports were purely inadvertent, the overall pattern indicated a

probable rationalization that "in the aggregate she was claiming only as much as she felt she was entitled to," as distinguished from a fraudulent motivation on her part. As to the two days' leave not reported, the committee unanimously found it credible that plaintiff did not know her action was illegal or even a serious wrongful act, and, furthermore, that she believed "she had an understanding with Mr. Freedman that this method of making up for her lost annual leave would be sanctioned by him." For these and other reasons the committee unanimously recommended that the decision to dismiss plaintiff be rescinded, and that a penalty of suspension "not to exceed 120 days" be imposed upon plaintiff. The committee filed its summary of the evidence, findings and recommendations in the form of a 70-page memorandum addressed to the defendant, Robert C. Seamans, Jr., dated May 15, 1963.

7. By letter dated May 27, 1963 the defendant, Robert C. Seamans, Jr., acting in the scope of his authority as agent of the defendant, James Webb, summarily rejected the recommendation of the ad hoc committee, thus approving plaintiff's dismissal. The defendant Seamans did so without having read the transcript of the ad hoc committee hearings, nor having fully and properly evaluated its findings, thereby depriving plaintiff of due process of law and the fair review to which she was entitled. The said Seamans also asserted that plaintiff's dismissal would promote the efficiency of the Federal service, but without assigning any reasons or facts therefor.

8. Thereafter, plaintiff perfected her administrative appeal through the United States Civil Service Commission. Acting through its Appeals Examing Office and Board of Appeals and Review, and by agents accountable to the defendant, John W. Macy, Jr., the Commission affirmed the adverse action taken against plaintiff in all particulars. In the course of their review the agents of the Commission

ratified the errors of the defendant Seamans alleged in paragraph 8 above; and also wrongfully denied to the plaintiff certain procedural rights, including the following:

(a) The Commission failed wholly to consider the possibility that plaintiff's erroneous overtime reports were the result of a combination of mistakes and deliberate attempts to collect compensation for previously uncompensated overtime, on the mistaken but innocent assumption that this was proper procedure. Whether the evidence, including the record before the ad hoc committee, adequately sustained such an inference, the Commission failed to say: just as it also failed to consider whether such an inference would have constituted "cause" for discharge or, if it did, how it would relate to the gravity of the remedy to be imposed.

(b) The Commission did not consider the possibility that plaintiff failed to report annual leave on the mistaken but innocent assumption that, under prevailing custom, an employee could thus properly reclaim leave time not used in a preceding year. It wrongly confined the ambit of its review to the factual question whether plaintiff had "deliberately" failed to report the time or whether said failure had been officially approved by her superior, disregarding entirely the third factual possibility described above. Likewise, the Commission failed to consider whether such an inference would have constituted "cause" for discharge or, if it did, how it might relate to the gravity of the remedy to be imposed.

(c) The Commission failed to explicate the reasons, evidence or factual theory upon which it predicated its conclusion that the discharge of plaintiff would promote the efficiency of the Federal service, as required by law; but instead merely recited such a finding in pro forma fashion. This procedural deficiency was heightened by the fact that on the view it took of the case the ad hoc committee had not deemed it necessary to rule on the contention, advanced by plaintiff, that "in view of

her record of satisfactory service and the favorable opinions her former supervisors had of her abilities," the record would not support an inference that her discharge would promote the efficiency of the service.

(d) There was no evidence whatever to sustain the finding, made by the defendants Seamans and Webb, later ratified by the Commission, that discharge of the plaintiff would promote the efficiency of the Federal service.

(e) There was insufficient evidence to sustain the finding, made by the defendants Seamans and Webb, and ratified by the Commission, that the plaintiff deliberately falsified her overtime reports and thereby "fraudulently" secured overtime compensation from her employer.

9. The discharge of plaintiff, effected by defendants Seamans and Webb, and the reviewing officials in the United States Civil Service Commission, acting under the chairmanship of defendant Macy, on all the circumstances of this case, was arbitrary, unreasonable and capricious.

WHEREFORE, plaintiff prays that judgment be entered in her favor as follows:

1. That she was wrongfully and unlawfully removed from her employment in the Federal service.

2. That she is entitled to reinstatement in said employment.

3. For such other relief as to this Court may seem just and proper.

Glenn R. Graves

Attorney for Plaintiff

[Filed May 6, 1964]

ANSWER

Defendants by their attorney, the United States Attorney for the District of Columbia, on the basis of the certified administrative records answer the allegations in the complaint as follows:

1. Admit the allegations of paragraph 1.

2. Admit that the Court has jurisdiction to conduct limited judicial review (on the basis of the certified administrative records) of the personnel actions taken in plaintiff's case to determine whether they conformed to the governing law and regulations.

3. Admit the allegations in paragraph three.

4. Admit the allegations in paragraph four, except that it is denied that Dr. Stoller notified plaintiff of his intention to remove her; that Dr. Stoller discharged plaintiff; and that Dr. Stoller's letter did not assign reasons justifying plaintiff's removal. Affirmatively aver that plaintiff was officially removed by Philip Sload, the Headquarters Personnel Officer.

5. Admit the allegations in paragraph five. Affirmatively aver that the agency produced substantial evidence in support of its action.

6. Admit the allegations of paragraph six, except that the portion reading "a penalty of suspension not to exceed 90 days be imposed" is denied.

7. Deny allegations of paragraph seven, except that the assertion of Dr. Seamans is admitted.

8. Deny allegations of paragraph eight, except that it is admitted the Civil Service Commission affirmed the agency's action. Affirmatively aver that the agency's finding is supported by substantial evidence.

9. Deny the allegations of paragraph nine. Affirmatively aver the

action of the reviewing officials of the United States Civil Service Commission was proper and reasonable and was not arbitrary or capricious.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan
Principal Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Arnold T. Aikens
Assistant United States Attorney

[Filed, May 15, 1963]

NASA HEADQUARTERS

Washington 25, D. C.

MEMORANDUM FOR: Dr. Robert C. Seamans, Jr.
Associate Administrator

SUBJECT: Report and Recommendations of Ad Hoc Hearing Committee in the Appeal of Mrs. Agatha L. Mendelson from Dismissal from Employment by NASA

By a Notice of Appeal dated December 31, 1962, Mrs. Agatha L. Mendelson, an employee in the Office of Applications, NASA Headquarters, exercised the right given her under NASA regulations to make an appeal to you from the final decision of Dr. Morton J. Stoller, Director, Office of Applications, to dismiss her from employment by

NASA for disciplinary reasons. The dismissal action was carried out on January 6, 1963, before action could be taken on the appeal, the notice of which it appears was not actually received in your office until January 7, 1963.

On January 8, 1963, an Ad Hoc Hearing Committee was appointed by the Director of Administration, as provided for in NASA Management Instruction 17-7-30, for the purpose of conducting an oral hearing on Mrs. Mendelson's appeal, of making findings of fact on the issues involved in the appeal, and of making recommendations to you as to the final decision to be made on the appeal.

The oral hearing on the appeal having been held and completed, the Ad Hoc Hearing Committee now hereby submits its report of such hearing, its findings of fact on the issues involved, and its unanimous recommendations as to the final decision to be made by you on Mrs. Mendelson's appeal.

Also transmitted as a part of the complete record in the appeal are the verbatim transcript made at the oral hearing, the twenty-five Exhibits introduced into the record at the hearing, and copies of the closing briefs submitted by the Management Representative and the Counsel for Mrs. Mendelson.

I. SUMMARY OF ACTIONS WHICH LED TO MRS. MENDELSON'S APPEAL

1. The Notice of Charges

Mrs. Mendelson (then named Mrs. Kinzie) was first notified of the offense with which she was charged and the proposed disciplinary action of dismissal from employment in a letter from Dr. Stoller dated December 5, 1962 (Exhibit A). The specific offense charged against her was that of falsifying her own official attendance records, which is an offense recognized in the "Table of Disciplinary Offenses and Penalties for Employees in NASA" (Attachment A to NASA Management In-

struction 17-7-23). The maximum penalty authorized by the Table for a first commission of this offense is dismissal from employment; the minimum penalty authorized is a reprimand.

Mr. Stoller's letter cited four specific actions on the part of Mrs. Mendelson, as constituting the offense charged. These may be summarized as follows:

a. The first and third specific actions cited against Mrs. Mendelson involved precisely the same violation, but the actions occurred during different periods of time. In each instance, it was alleged that Mrs. Mendelson, while employed as a secretary in the Office of Applications, had claimed overtime work in excess of the time she was actually present for duty. The first specific action cited 11 specific dates on which she had claimed excess overtime during the period between January 27th and May 30th, 1962. (Attachment 1 to Exhibit A) The third specific action cited 10 additional specific dates on which she had done the same during the period between June 30th and October 13th, 1962. (Attachment 2 to Exhibit A) The total excess overtime thus claimed was alleged to be at least 16 hours and 41 minutes for the 11 days in the first period, and 28 hours and 45 minutes for the 10 days in the second period, for a net total of at least 45 hours and 26 minutes.

The basis used to establish that excess overtime was claimed by Mrs. Mendelson was through comparison of the sign-in and sign-out times shown for her, for the 21 dates cited, in the official building guard-registers maintained for FOB #6, against the amount of overtime she claimed for the same days on the official bi-weekly time and attendance reports filed during the period involved. This comparison indicated that on 17 of the 21 dates cited, all of which were Saturdays, Sundays or holidays, the guard-registers showed Mrs. Mendelson had been present in FOB #6 for a shorter period of time than the time subsequently claimed as overtime on the time and attendance report she filed. On the remaining 4 of the 21 dates cited, the guard registers

showed no sign-in or sign-out times, although Mrs. Mendelson subsequently claimed overtime for these 4 dates.

As a part of both these actions, it was also alleged that Mrs. Mendelson had prepared her time and attendance reports herself, and had presented them to her supervisor for certification, representing them to be accurate and correct in all respects.

Since these two actions constitute exactly the same violation, and rely on the same basis of proof, they will hereafter in this report be treated together, as involving a single, repeated violation.[1]

b. The second action cited may be set forth verbatim, as follows:

> "On June 28, 1962, I issued a memorandum on the subject of overtime, stressing the need for reducing the amount of secretarial overtime required and emphasizing the importance of keeping a close watch on the actual usage of overtime. Both you and Mr. Carl Freedman, your supervisor, participated in the preparation of that memorandum. You were well aware, therefore, both of my desire to control the abuse of overtime and of the necessity for control. In addition, in a signed and certified statement on file in the Inspections Division, Mr. Carl Freedman states that several months prior to October 1962 he discussed this matter with you very explicitly and advised you of the necessity of keeping accurate time and attendance records. You admit being a party to this discussion."

c. The final action cited alleged that Mrs. Mendelson had, after having taken annual leave between May 31st and June 15th, 1962, prepared a time and attendance report covering the two-week period of June 10 - 23, 1962, on which she recorded that she had been on annual leave for five full days during the week beginning June 10th. Subse-

---

[1] The reason these two actions were treated separately in the notice of charge is that Dr. Stoller's memorandum of June 28, 1962, on the subject of overtime intervened between the two time periods involved.

quently, she had prepared a revised time and attendance report for the same period, on which she recorded that she had been in a duty status on June 14th and 15th. The revised time sheet was alleged to be incorrect, and therefore to constitute a falsification.

2. Mrs. Mendelson's Reply

Mrs. Mendelson's reply to Dr. Stoller's notice of charges was made on December 11, 1962 (Exhibit B). In summary, her defenses against the actions cited were as follows:

a. The 21 excess overtime claims:

(1) They were the result of honest mistakes which she had made in preparing her time and attendance reports. She did not fraudulently falsify the reports to obtain overtime compensation, nor was it ever her intention deliberately to do anything that would result in her profiting improperly at the expense of the Government.

(2) There were mitigating circumstances involved. The entire period of time during which the excess overtime claims were made was one of great activity in the Office of Applications, involving a rapid buildup of personnel and the carrying out of expanded program functions of the Office. For a period of time after she joined the office in November, 1961, she was the only secretary assigned to the Programs Division, and her supervisor, Mr. Freedman, had assigned many adminstrative duties to her, in addition to her normal secretarial duties, such as ordering office furniture and equipment, arranging for telephone installations, setting up a filing system, drafting organizational charts and job descriptions, handling personnel matters, etc. Under the circumstances and due to the pressures of her many duties, she was not able to give adequate attention to everything, so that errors and discrepancies did result. She regarded the preparation of time and attendance reports as of less importance than other things, and ordinarily would not prepare them until the Monday after the close of the pay period, at

which time she was forced to rely on her own memory and the recollections of other employees as to her attendance and how much overtime she had worked. This hasty and last minute action resulted in errors.

(3) A possible explanation of the excess overtime claims for Saturdays, Sundays and holidays was that she believed she had worked many overtime hours during the week which she had not claimed as overtime.[2] Mrs. Mendelson submitted with her letter of reply a tabulation covering the entire period between January 26th and October 13th, 1962, which indicated her estimate of overtime hours worked which she had not claimed. These totalled 42 hours, 20 minutes for the entire period, as against the total of 45 hours, 26 minutes excess overtime claimed with which she had been charged. Mrs. Mendelson indicated this tabulation was, for the period between January 26th - June 30th, 1962, only an estimate, based on the fact that on the majority of week days she had arrived at work on or before 7:30 a.m. and had worked until at least 5:00 or 5:50 p.m. The tabulation for the period July 9 - October 13, 1962, was based on notes she had made in a calendar log she had maintained during the period - or at least during July and most of August.

(4) Mrs. Mendelson had not actually collected overtime pay for three of the dates - September 30th, October 7th and October 13th - cited in the notice of charges. Mrs. Mendelson had reported a total of 18 hours overtime for these three days but when she received the pay check which included pay for this overtime she knew a mistake had been made. She had therefore not cashed the check, and had talked to Miss Morris in the Payroll Section, who had instructed her how to straighten the matter out. Mrs. Mendelson was especially harassed

---

[2] Although Mrs. Mendelson did not state it explicitly, the implication of this defense would appear to be that she had added the overtime hours worked on weekdays which she had not claimed to the amount of overtime claimed for weekend work.

during this specific period because in addition to all her office work, she was preparing a birthday party for her fiance and making plans for her approaching wedding.

(5) Although Mrs. Mendelson felt she had worked more overtime than she had ever reported, she was willing if it was thought she owed the Government for the time not shown on the guard-registers to pay back the amount involved, and to promise that nothing like this would happen again, and to follow all instructions and regulations carefully.

(6) Finally, Mrs. Mendelson pointed out that the total of excess overtime she was charged with amounted to only about 27 hours,[3] which meant excess overtime pay for her of only $95. This would be a terrible price to pay for a career of 11 years Government service. Neither she nor anyone else would deliberately risk his Government career for $95.

b. Dr. Stoller's memo on overtime of June 28, 1962, and Mr. Freedman's discussion with Mrs. Mendelson:

After the memo had come out, and Mr. Freedman's discussion, she had maintained a fairly complete record of her attendance and overtime on a calendar diary during July and most of August. She had then become swamped with office work again, and was distracted from keeping time and attendance properly.

c. The two days of annual leave not charged:

She had revised the original time and attendance report so as to show herself present on June 14th and 15th in order to compensate herself for some of the annual leave she had lost at the end of the preceding leave year because she had been unable to take leave due to the demands of the office work. She did not realize this was illegal. At

[3] This calculation excluded the 18 hours which Mrs. Mendelson had originally claimed but for which she had returned the overtime pay because she recognized an error had been made. See paragraph (4) above.

previous Government offices where she had worked an informal office record was kept of annual leave which has been lost because a person was not permitted to take it before the end of the leave year. The employee was then permitted in the following year to take the amount of leave thus lost, without having it counted as leave. Mrs. Mendelson had since charged these two days to annual leave.

3. Final Decision to Dismiss Mrs. Mendelson:

By letter dated December 27, 1962, (Exhibit C) Dr. Stoller notified Mrs. Mendelson of his final decision that she would be dismissed from Federal employment as of January 6, 1963. He had carefully reviewed Mrs. Mendelson's reply to his earlier notice of charges, and had concluded that she had not refuted the facts alleged in the four specific actions cited as the basis for the offense charged, and therefore that she had violated established instructions regarding time and attendance reporting; that she had falsified her overtime reports; and that she had thus obtained overtime compensation fraudulently. Dr. Stoller's letter also commented on the specific defenses made by Mrs. Mendelson, as follows:

a. The defense that the 21 excess overtime claims were a series of honest mistakes: Of all the overtime claimed for Saturdays, Sundays and holidays between January and October, 1962, which could be verified against the building guard-registers, only one claim contained a mistake in the Government's favor; twenty-one claims contained mistakes in Mrs. Mendelson's favor.

b. The defense of mitigating circumstances, which caused the errors and discrepancies: The heavy workload and job pressures might help to explain honest errors made before June 28, 1962, the date of Dr. Stoller's memorandum on overtime, but not thereafter, in the face of the emphatic instructions contained in his memorandum.

c. The defense that she had worked a substantial amount of overtime on weekdays which she had not claimed (or had added it to claims

for weekend overtime): The estimates of unreported overtime in Mrs. Mendelson's tabulation did not in fact correspond with much of the information shown in her calendar notes, and in many instances the calendar did not contain any entries for dates for which she claimed unreported overtime in the tabulation. In any event, if she did have unreported overtime for weekdays, she would not be justified in making false claims for weekends or holidays. NASA regulations do not permit accumulation and transfer of overtime from one day to another.

d. A check of the attendance and overtime records kept by Mrs. Mendelson for July and August, 1962, against the guard-registers and the time and attendance reports submitted by Mrs. Mendelson for this period showed at least ten specific discrepancies.

e. The defense that she had not collected overtime pay for 18 hours of the excess overtime with which she was charged. Mrs. Mendelson had not done anything about the check which included payment for the 18 hours until after she had been questioned by Mr. Haynes the first time, on October 25, 1962, about her excess overtime claims, at which time she had initially claimed her overtime report for the three days involved was correct. Subsequently she had called Mr. Haynes to suggest she might return her check to Payroll so the error could be corrected.

f. The defense against improper reporting of annual leave for June 14th and 15th, 1962: Dr. Stoller could not believe that any employee with 11 years of Government service could believe that the practice of making an adjustment for forfeited annual leave was proper, or not realize it was illegal.

Dr. Stoller also advised Mrs. Mendelson that further action would be taken to advise her of the amount of excess overtime pay she would be required to refund. Since this is a matter which is outside the scope of Mrs. Mendelson's appeal, it will not be discussed further in this report.

4. Personnel actions taken to remove Mrs. Mendelson from NASA Employment

Mrs. Mendelson's dismissal from Federal employment was accomplished by (1) execution of a Request for Personnel Action (Standard Form 52) by Dr. Stoller, requesting that she be removed from employment effective January 6, 1963, and (2) execution of a Notification of Personnel Action (Standard Form 50) by Mr. Sload, Personnel Officer, NASA Headquarters, notifying Mrs. Mendelson she would be removed from employment as of that date. Copies of these two formal actions were inserted into the hearing record as Exhibits E and F.

II. THE NOTICE OF APPEAL

Mrs. Mendelson's Notice of Appeal was dated December 31, 1962, but it was endorsed by Mrs. Turner, Secretary to the Associate Administrator, to indicate that it was not received in his office until January 7, 1963, (Exhibit D).

As two bases for the appeal, the Notice alleged that several procedural errors had been committed in connection with Mrs. Mendelson's dismissal, and therefore that all proceedings in that connection were null and void and of no legal effect.

These two grounds on which the appeal was based will be treated subsequently in this report, in connection with the findings of the Ad Hoc Committee.

As a further basis for the appeal, Mrs. Mendelson denied the allegations in the letter of charges dated December 5, 1962, to the effect that she had perpetrated a fraud against the U.S. by claiming excess overtime allowances. She further alleged that at no time was there any intent or purpose on her part to perpetrate any fraud against the U.S., and that she had in fact worked many hours of overtime in excess of any amount for which she had claimed overtime compensation.

Mrs. Mendelson's efficiency rating had always been satisfactory during her eleven years of continuous Government employment preceding her dismissal, and she had never during that period had any charges filed against her on any account whatsoever.

Mrs. Mendelson requested an oral hearing on her appeal, the right to present witnesses and evidence in her behalf and to be represented by counsel, all as provided for by NASA regulations. She designated Claude L. Dawson, Esq. 1049 Shoreham Building, Washington 5, D.C. as her Counsel for such hearing.

III. The Oral Hearing

1. The oral hearing on Mrs. Mendelson's appeal was held on March 6th, 7th, 8th and 11th, 1963. By agreement of the Hearing Committee and the parties, the hearing was then recessed for the purpose of allowing the parties to study the transcript of testimony and Exhibits, and to submit closing briefs. The hearing was reconvened on April 3, 1963, for the presentation by each side of a final oral argument on the briefs submitted. Also by agreement of the Committee and the parties, Exhibits X, Y, and Z were introduced into the record at the session of April 3d.

2. Mr. Albert S. Hodgson, B, acted as Management Representative at the hearing. Mr. Charles G. Haynes, BI, acted as Assitant Management Representative.

3. Mrs. Mendelson was represented at each hearing session by Claude L. Dawson, Esq.

4. Mr. Philip H. Sload, BPH, was present at each session of the hearing to advise the Committee and the parties on personnel matters, as provided for under NASA Management Instructions 17-7-30.

5. Mr. Hodgson called the following witnesses on behalf of Management (in order of appearance):

a. Mr. Carl Freedman, FP, NASA
b. Mr. Angus Sanders, BI, NASA
c. Mr. J. D. Young, B, NASA
d. Miss Josephine Dibella, AD, NASA
e. Mrs. Rita Maffett, FP, NASA
f. Miss Elsie Johnson, F, NASA
g. Miss Ann Rollison, F, NASA
h. Mrs. A. Marie Coleman,[4] F, NASA
i. Mr. Carl Freedman, FP, NASA (recalled)

6. Mr. Dawson called the following witnesses on behalf of Mrs. Mendelson (in order of appearance):

a. Mr. John S. Patterson, Commissioner, Federal Maritime Board
b. Col. Wilfred J. Smith, USAF
c. Mrs. Mendelson
d. Mrs. Katherine Yowell, FP, NASA
e. Mrs. Mendelson (recalled).

7. Dr. Stoller did not appear as a witness at the hearing because of his confinement in the hospital. Further, it was considered by the Hearing Committee that he was too ill to be asked to submit a deposition or respond to interrogatories. This situation was discussed by the Chairman with Mr. Dawson in advance of the hearing, and again at the opening of the hearing (transcript - pp. 17 - 19). Mr. Dawson agreed not to raise a question about Dr. Stoller's unavailability.

8. Mrs. Mendelson also desired to call Dr. Morris Tepper, FM, as a witness in her behalf, but he was out of the country at the time the hearing was held. It was therefore agreed that the parties would submit interrogatories and cross-interrogatories to Dr. Tepper. Dr. Tepper responded to these on March 29th, and they were inserted into the

[4] Mrs. Coleman was called as a Management witness at the request of the Hearing Committee.

record at the final hearing session on April 3d, as Exhibits X and Y. For the purposes of this report, they will be treated in the same manner as testimony given at the hearing.

9. Summary of and comments on the testimony

In summarizing and commenting on the testimony given by witnesses at the hearing, this report will, to the maximum extent feasible, treat individually the three violations which formed the basis for the charge against Mrs. Mendelson - i.e. the 21 excess overtime claims, Mrs. Mendelson's non-compliance with Dr. Stoller's memorandum of June 28, 1962, on overtime, and the 2 days of annual leave not charged.

a. The 21 excess overtime claims:

The fact that Mrs. Mendelson had,for the 21 days cited in attachments 1 and 2 to Exhibit A, actually claimed more hours of overtime than the number of hours which the building guard-registers indicated she was on duty for those days did not have to be proved at the hearing. Mr. Dawson agreed to stipulate that the sign-in and sign-out entries in the guard-registers which were shown in attachments 1 and 2 were accurate as shown, or, where no sign-in or sign-out times were shown for dates cited in the attachments, that none appeared in the guard-registers. The entries on attachments 1 and 2 showing the overtime actually claimed for the 21 days cited were verifiable against zerox copies of the time and attendance sheets actually filed with the Payroll Office for the total period involved (January 7th to October 13th, 1962), which were admitted into the record as Exhibit G.[5]

As noted previously, Mrs. Mendelson had, in her reply to Dr. Stoller's letter of charges, entered various defenses against the allega-

[5] For the period September 30 - October 13, 1962, Mrs. Mendelson had ultimately submitted a corrected time sheet (Exhibit H) reducing the overtime claimed during this period by the 18 hours excess claimed for 9/30, 10/7 and 10/13/62. Exhibit G includes the time sheet filed originally for this period.

tion that she had made 21 excess overtime claims. Testimony relating to these defenses can be summarized as follows:

(1) The 21 excess claims were a series of honest mistakes:

Management sought to show that the pattern of mistakes was too consistently in Mrs. Mendelson's favor to be explained away as mere honest mistakes. Mr. Sanders testified that he had examined all of the guard-registers for FOB #6 for the period from January through October, 1962, and had checked them against Mrs. Mendelson's time and attendance reports for this period. She had claimed overtime on a total of 35 Saturdays, Sundays and holidays during the period. Mr. Sanders had been unable to compare the overtime claimed against guard-register entries for seven of these days, because in two registers the entries were illegible, in two other registers there was a sign-in entry but no sign-out entry, and for three of the days involved, the guard-registers were not available. Of the 28 days remaining, the guard-register entries indicated Mrs. Mendelson's overtime claims were accurately stated or were within 15 minutes of being accurate on five days. Of the remaining 23 days, the register entries indicated Mrs. Mendelson had been in FOB #6 for more time than she had claimed as overtime on only 1 day, and for less time on 22 days.[6]

In summary, Management contended that documentary evidence and Mr. Sanders' testimony proved that out of the total of 28 week-end and holiday overtime claims which were verifiable against the guard-registers, Mrs. Mendelson had been accurate or reasonably accurate on only five days; that on only one day had she understated the amount of overtime worked, by 55 minutes; and that on the remaining 22 days,

---

[6] Through oversight, Dr. Stoller's letter of charges had cited only 21 of these 22 days. Management cited the 22d day - March 4, 1962, on which a claim of 4 hours overtime was made, but for which no sign-in or sign-out entry appeared in the guard-register for FOB #6 - only as further evidence of the pattern of excess claims in Mrs. Mendelson's favor.

she had overstated the amount worked by a total of 49 hours and 26 minutes. Management submitted that this pattern of excessive overtime claims could not be rationalized by saying that honest errors were committed.[7]

In her testimony, Mrs. Mendelson contended that the 21 excess claims could be explained as mistakes. She admitted that she had for the most part kept no record of the actual overtime hours worked on weekends; that she had customarily not made up her time and attendance reports until the Monday morning after the end of the pay-period; and that she had determined the number of hours overtime she would claim either by personal recollection, by asking other secretaries in the office as to how long she had worked, or by pure guess. She had never thought to check the guard-register entries as a means of verifying the overtime she had actually worked.

Mrs. Mendelson's testimony on this point was supported to some degree by testimony from Mrs. Coleman and Mrs. Yowell, who agreed that Mrs. Mendelson was often quite vague about the number of overtime hours she had worked, and had asked them about it. However, these queries usually related to overtime hours for weekdays, when they had worked overtime along with Mrs. Mendelson, rather than for weekends.

Mr. Freedman testified that in his opinion Mrs. Mendelson's 21 excess overtime claims were the result of negligence and sloppy record keeping, and that he did not believe the excess overtime claims were made with the intent of falsification or defrauding the Government.

---

[7] In Exhibit Z, and in its closing brief, Management also alleged that to the extent overtime claims for weekdays could be audited against guard-register entries (which is possible only if the overtime claimed exceeds three hours), a similar pattern of mistakes in Mrs. Mendelson's favor and against the Government was shown. Since no testimony was given on this point, and since the guard-registers for the days involved were not introduced into the record, the Committee has been unable to evaluate whether these are facts which also tend to support Management's contentions as to the pattern shown in connection with the 21 week-end and holiday claims.

Mr. Freedman conceded on cross-examination that he was not fully aware of the extent of the pattern of excess overtime claims in Mrs. Mendelson's favor which had been shown by Management; that with some exceptions he had no independent knowledge of how much overtime Mrs. Mendelson had worked on weekends or holidays; and that he had never attempted to verify the amount she claimed. However, Mr. Freedman was emphatic in his opinion that Mrs. Mendelson was a person of honesty and integrity, who would not deliberately falsify a time and attendance record.

On cross-examination, Management questioned Mrs. Mendelson at length about two of the 21 excess overtime claims, where the possibility of honest mistake appeared particularly remote. The first of these was Memorial Day, May 30th, for which Mrs. Mendelson's time and attendance report showed 3-1/2 hours overtime was claimed. The guard-register entries showed she was in FOB #6 for only 1-1/4 hours on that date. Mrs. Mendelson had gone on annual leave as of May 31st and her time and attendance report had been prepared by Mrs. Yowell in Mrs. Mendelson's absence.

Mrs. Yowell testified that she believed she had shown 3-1/2 hours overtime for May 30th on the basis of a note left by Mrs. Mendelson that she had worked this amount, but her recollection of this was not absolutely clear, and she did not have the note available. Mrs. Mendelson agreed she had probably left a note for Mrs. Yowell but had no clear recollection or explanation of the matter.

Management contended that if the 3-1/2 hours was claimed on the basis of Mrs. Mendelson's note to Mrs. Yowell, Mrs. Mendelson would have had to prepare the note on May 30th, the same day the overtime was worked, so that an honest mistake as to the number of hours actually worked was virtually impossible.

The second instance of excess overtime cited was the 8 hours claimed by Mrs. Mendelson for October 13th, a day on which the guard-

register showed she had not signed in or out at FOB #6 at all, and for which Mrs. Mendelson conceded she had not worked any overtime. The time and attendance report was filed by Mrs. Mendelson on October 15th, only two days after the date involved. Management argued that Mrs. Mendelson could not have been honestly mistaken in recalling that she had worked 8 hours on October 13th, when she made the claim only two days later. Mrs. Mendelson's testimony was that she had been especially busy and harassed at this period, and had simply made a mistake in entering the 8 hours. However, she argued that this was one of the three days of excess overtime claimed where she herself had discovered the error and had returned her pay check - a defense which will be taken up later in this report.[8]

As further illustration of the pattern of mistakes which were in Mrs. Mendelson's favor, Management also cited several discrepancies between the original and revised time and attendance reports prepared and submitted by Mrs. Mendelson for the period June 10-23, 1962 (Exhibit K).[9] The report prepared originally, which Mrs. Mendelson

---

[8] A similar argument made by Management related to 5 hours overtime claimed by Mrs. Mendelson for December 23, 1961, when the guard-registers for the H Street Building (where Mrs. Mendelson then worked) similarly indicated no sign-in or sign-out time. The time and attendance report had been prepared only 3 days later. Substantial testimony was given and arguments made as to whether an employee could or could not enter and leave H Building offices without going to the second floor where the guard-register was located. Because this question could not be proved conclusively at the hearing, the Committee has determined that it must leave this argument entirely out of consideration, noting only that Mrs. Coleman testified she believed Mrs. Mendelson had worked that day, but that she had no absolutely clear recollection about the matter. For the same reasons, the Committee has also left out of consideration Management's arguments concerning 4 hours overtime reported for December 24, 1961, and 4 hours for January 20, 1962, when, similarly, the guard-registers at the H Street Building showed no sign-in or sign-out times.

[9] These are the same time sheets as are involved in the third action cited by Dr. Stoller, involving the 2 days of annual leave not charged, which will be discussed separately later in this report.

subsequently replaced with a revised report, but of which she retained a copy, showed 4 hours overtime for 6/18; on the revised sheet this was increased to 5 hours. Management contended that her calendar and the guard-register entry indicated she had worked only 3 hours on this date. For 6/22, the original report showed 1 hour overtime, which was consistent with the note on Mrs. Mendelson's calendar pad; on the revised report this was increased to 1-1/2 hours. For 6/23, the original report showed 6 hours overtime, which was consistent with the note on her calendar pad; on the revised report this was increased to 7 hours. The amount of overtime claimed for this date - a Saturday - could not be checked against the guard-register because of its illegibility.

A further mistake cited by Management for this period, which appeared on both the original and revised time reports, was the 3-1/2 hours overtime claimed by Mrs. Mendelson for 6/19, whereas her calendar indicated she had worked a maximum of 2 hours and 20 minutes overtime.

As to each of these discrepancies, Mrs. Mendelson testified generally that she could not explain them, but suggested that the change made for 6/18 from 4 hours to 5 hours could have been a typographical error which occurred in connection with her intent to change the 4 hours to 3 hours. As to the other discrepancies, Mrs. Mendelson pointed out that each involved a comparison with entries on her calendar, which she insisted was too inaccurate during this period to be relied upon.

(2) Mrs. Mendelson's second defense was that there were mitigating circumstances involved - i.e. she had had a great many diverse duties, was under pressure, had prepared her time sheets at the last moment, etc., and these things had contributed to the mistakes she had made:

The testimony of all the witnesses from the Office of Applications confirmed that the period from January through October, 1962, was one of great activity in the Office, involving a rapid build-up of personnel, a heavy workload, substantial overtime for everyone, etc. Mr. Freedman testified that he had assigned Mrs. Mendelson many duties which went beyond the secretarial and that she had acted more in the capacity of an administrative assistant to him - e.g., she had ordered and selected office furniture, interviewed job applicants, acted as office timekeepr, etc.

Management established that each of the secretaries who testified (except Mrs. Mendelson) had a routine method for keeping track of the overtime they worked, and that they did not consider it a difficult task to keep an accurate record despite the workloads and pressures they experienced themselves.

On the other hand, it appeared from the testimony of these secretaries, and of Mrs. Mendelson and Mr. Freedman, that none of them, except perhaps Mrs. Coleman, had to work as much overtime or had as heavy or diverse a burden of duties as Mrs. Mendelson.

(3) Mrs. Mendelson's third defense was that she believed she had worked many hours of overtime during the week which she had not claimed as overtime: Mrs. Mendelson's general thesis, which was stated in her reply to the letter of charges and in her testimony, was that she customarily arrived for work at least by 7:30 a.m.; that she habitually worked at least until Mr. Freedman left for the day, between 5:30 and 6:30 p.m.; and that as a regular practice she worked through her lunch hour, eating sadnwiches at her desk. Her weekday overtime claims on the other hand, reflected only overtime hours worked at the end of the day, except to the extent that she would sometimes use part of the morning or noon-day overtime to round out an evening hour or half-hour. She would also occasionally report morning hours if she came in especially early to do a specific job.

In her reply, Mrs. Mendelson supported this argument by attaching a tabulation (attachments to Exhibit B) of weekday overtime hours which she alleged she had worked but had not claimed. Part of this was made up from memory, based on her normal working day habits, and part of it was based on the records she had kept during portions of July and August, 1962. The tabulation indicated, in an approximate sense, that if she had counted the early arrival times and the lunch periods she had worked through, she might have claimed about as much additional overtime as the amount of excess overtime reported for weekends.[10]

Management sought to rebut this defense on various grounds: First, by testimony of Mr. Young and Miss Dibella that they had on numerous occasions met or seen Mrs. Mendelson in the lunch room in FOB #6 before 8:15 a.m. having breakfast. Mr. Young testified that at least during the period between February and April of 1962 he had seen Mrs. Mendelson three or four times a week, except for such days as he had been out of town. Miss Dibella testified that during a one to two month period she had seen or had breakfast with Mrs. Mendelson in the cafeteria two or possibly three times a week, and had first met

---

[10] At the hearing, a revised and allegedly more accurate version of this tabulation was introduced by Mr. Dawson as Exhibit P. A great deal of time was spent at the hearing in argument as to the purpose of introducing this Exhibit - i.e., whether it purported to prove that Mrs. Mendelson had worked overtime on weekdays which she had consciously added to the overtime reported for weekends, or whether it was intended as a piece of general character evidence, demonstrating that over-all Mrs. Mendelson had habitually claimed less overtime than she was entitled to, rather than excess overtime as charged. Involved in this argument also was the problem of whether the specifics of Exhibit P, based as it concededly was in large part on recollection and unprovable assumptions as to Mrs. Mendelson's arrival time on particular days and whether she had worked through her lunch hour on particular days, could be rebutted by Management.

It was eventually agreed by the parties that Exhibit P would be withdrawn. However, Mrs. Mendelson's testimony as to her customary work habits remained open to rebuttal.

her in that way. She was unsure of the period involved but finally identified it as beginning approximately two months prior to Mrs. Mendelson's wedding, which was in late November. In this same connection, Mr. Young had testified he had sometimes seen Mrs. Mendelson eating breakfast with Miss Dibella, possibly in the period between February and April, but no later than mid-July, 1962, when Mr. Young's office was moved to the L Building.

Mrs. Mendelson's testimony on this point is that she did not usually eat breakfast in FOB #6, but did so at irregular times when Mr. Freedman was out of town, for periods which sometimes extended two or three weeks.

The testimony of other witnesses on this issue was inconclusive. Most of the other secretaries in the office did not arrive until on or about 8:15 a.m. The testimony varied between some who said Mrs. Mendelson was generally present at 8:15 and was working, or was present and had not necessarily commenced work, but may have been occupied in making coffee or watering the office plants; and others who said she was sometimes out of the office at 8:15 but who could not state positively whether she was in the cafeteria or may have been performing office duties elsewhere.

During some periods in this time-span, Mr. Freedman arrived at 7:30 a.m. or shortly thereafter. His recollection was that Mrs. Mendelson was usually present and working when he arrived. Mr. Freedman also testified he had been absent for a week in March, two weeks in May, a week in June, three weeks in August and September, and on miscellaneous other days. Mr. Freedman also testified that he believed Mrs. Mendelson arrived early in the morning as a consistent matter, even when he did not, because of the frequency with which she would have finished work to give him when he arrived.

Management also sought to rebut this defense of Mrs. Mendelson's through the testimony of various secretaries who stated that Mrs. Men-

delson habitually, to the extent of two, three and even four times a week, took lunch hours lasting 2 to 2-1/2 hours, over a period of many months. Mrs. Maffett and Miss Rollison were the principal witnesses testifying to this effect, and Miss Rollison had even kept an informal record of her own of the long lunch hours which Mrs. Mendelson had supposedly taken. This record (which was not introduced in evidence, but was used by Miss Rollison to refresh her memory) showed a total of 7 days in a period of approximately 10 weeks on which Mrs. Mendelson was absent for several or more hours at the lunch period. Even as to these dates, however, Miss Rollison was unable to state definitely that Mrs. Mendelson was at lunch during the entire time she was absent from the office, or whether she may have been attending to tasks outside the building which had been assigned to her by Mr. Freedman.

In explanation of the fact that Miss Rollison's record showed only 7 entries in a priod of 10 weeks, Management established that either Miss Rollison or Mrs. Mendelson had been on annual leave during approximately four weeks of the period involved.[11]

Mrs. Coleman testified that she had not been aware particularly of a pattern of 2-2-1/2 hour lunch periods taken regularly by Mrs. Mendelson, but that she would not necessarily have known about them. Mrs. Yowell, on the other hand, testified that to her certain knowledge Mrs. Mendelson had habitually - sometimes as often as five times a week - eaten her lunch at her desk, and that on only a few occasions, which she believed sometimes included doing errands for Mr. Freedman, had Mrs. Mendelson taken an extended lunch hour.

Mrs. Mendelson testified that she had habitually eaten at her desk, and that she had taken long lunch hours on only a comparatively few occasions during the entire period of time involved. Moreover, these

---

[11] Miss Rollison testified that Mrs. Maffett had also kept this kind of secret record on Mrs. Mendelson's lunch periods. Mrs. Maffett did not reveal this to the Committee and apparently had destroyed it before the hearing.

were sometimes in connection with trips to other agencies or buildings on official business, when she would have lunch in another cafeteria or in town as a matter of convenience.

Mr. Freedman testified that he was unaware of any pattern of long lunch hours taken by Mrs. Mendelson and that he considered he would have been aware of them, in the normal course of affairs, because he was very reliant on Mrs. Mendelson's presence to carry on his own work. He also verified that he had on a number of occasions assigned official tasks to her which required that she go to the General Services Administration or the L Building, and occasionally had asked her to do personal errands for him, such as cashing his pay check. He agreed that these assignments may well have been carried out in conjunction with Mrs. Mendelson's having lunch outside FOB #6.

As indicated previously, Mrs. Mendelson's contentions concerning the week-day overtime worked which she did not report were based in large part on her recollections that she had normally arrived at the office at least by 7:30 a.m. and had frequently worked through her lunch hour. In general, she had no records to support this, except for a period during July and portions of August, 1962, during which she had kept what she considered was a fairly accurate record of her attendance and overtime on a spiral calendar. At the request of the Committee, this record was introduced as Exhibit V, and it was agreed that Management would be permitted to submit written comments on it after the close of the first phase of the hearing. These were subsequently introduced as Exhibit Z.

The Management comments indicated that most of the entries in the calendar record could not be verified against guard-registers because arrival and departure times were within periods when the registers were not in effect, but that some entries did agree with the guard-registers. Management cited six examples of discrepancies in this connection, but of these only three related directly to the issue

whether the calendar record accurately reflected the overtime hours worked.[12]

(4) Mrs. Mendelson's fourth defense was that she had not actually collected overtime pay for three of the days cited in Attachment B to Exhibit A - i.e. 9/30, 10/7 and 10/13/62. She had realized that an error must have been made when she received her pay check for this period, and had therefore not cashed it because she planned to refund the excess amount, which she had subsequently done.

Mrs. Mendelson testified that she received the pay check in question on October 24th, and had not cashed it that day, as she ordinarily would have done, because she recognized the amount was larger than it should have been, and she suspected an error had been made; that she did not mention having the pay check at her first interview with Mr. Haynes on October 25th because she considered it a personal matter, which she did not feel called upon to discuss with him, and because he did not ask her specifically about the pay check; and that she had not taken immediate action to correct the error because she was not sure how to go about it. A few days later, she had telephoned Mr. Haynes to ask him what she should do about the check. He had advised her to contact the Payroll Office, which she had done, and eventually the error had been corrected.

Mrs. Mendelson conceded that at her first interview with Mr. Haynes she had initially stated that she did not believe she had made any excess overtime claims, but that when Mr. Haynes pointed out that the guard-register entries for certain days - including October 13th - did not show a sign-in or sign-out entry, she had then recalled (although not necessarily at this first interview, but at least by the following day)

---

[12] Other Management comments in Exhibit Z, which are unrelated to the present issue, are referred to in footnote 7 (p. 24) of this report.

that she had not worked that day because she had given a party for her fiance.[13]

With respect to the other two days involved in this issue - 9/30 and 10/7 - Mrs. Mendelson stated that she believed she had worked on at least one of them, even though the guard-registers contained no entries for either day, because she recalled having chatted with the guard about the weather. Nevertheless, she had refunded the overtime money for both days, presumably because of Mr. Haynes' statements that the guard-registers indicated she had not been in the building either day.

Management sought to rebut this defense by bringing out on cross-examination that Mrs. Mendelson had not done anything immediately about correcting what she believed was an error in her pay check, and in fact had not even metnioned having it during her first interview with Mr. Haynes. Further, Mrs. Mendelson had contended initially in her first interview with Mr. Haynes that she did not believe she had made any excess overtime claims, and had not even recalled that she had not worked on October 13th until after he had informed her that the lack of guard-register entries for the three days involved indicated that she had not worked any overtime on those days.

(5) Since the fifth and sixth defenses made by Mrs. Mendelson in connection with the allegations of 21 excess overtime claims did not raise any questions of proof, they do not require comment in this report.

b. The second action cited by Dr. Stoller: Mrs. Mendelson's non-compliance with his memo on overtime of June 28, 1962, and Mr. Freedman's discussion with her:

Both in his letter of charges (Exhibit A) and his letter of final decision (Exhibit C) Dr. Stoller cited the June 28th memo on overtime

---

[13] The overtime claimed for October 13th is also referred to on p. 27 of this report.

as being directed not only to the amount of overtime used, but to the need for controlling the abuse of overtime. The filing of excess overtime claims after June 28th was therefore apparently regarded by Dr. Stoller as an aggravated form of the same violations committed by Mrs. Mendelson prior to the date of the memo, because she had also not complied with the instructions in the memo.

Mr. Freedman testified that the June 28th memo, which he had drafted, was directed only to the excessive use of overtime, and had nothing to do with the keeping of overtime records. He also agreed that to the extent Management relied on the memorandum as a further demonstration of Mrs. Mendelson's abuse in making excessive overtime claims, the memo had no particular relevancy, because of the fact that it was not directed at the accurate reporting of overtime.

Dr. Stoller's letter of charges also cited the fact that in the voluntary statement submitted by Mr. Freedman to Mr. Haynes on November 21, 1962, Mr. Freedman stated he had had a conversation with Mrs. Mendelson several months earlier during which he had advised her of the necessity of keeping accurate time and attendance records. Dr. Stoller apparently regarded any filing of excess overtime claims by Mrs. Mendelson after this conversation as an aggravated form of the vilation also.

In his testimony, Mr. Freedman indicated he was not certain of when this conversation had taken place, nor what it related to specifically. Generally, he thought it had to do with time and attendance reporting, but he could not recall precisely whether the reporting of overtime or of leave was involved.

Mr. Freedman originally placed the date of the conversation as several months prior to November, 1962. From Mrs. Coleman's and Mrs. Mendelson's testimony, however, it appears most likely that it occurred shortly after Mrs. Mendelson returned from annual leave in

mid-June. Mr. Freedman testified, nevertheless, that there was no relationship between this conversation and the origin of Dr. Stoller's memo of June 25th.

To determine what Mr. Freedman's conversation with Mrs. Mendelson may have pertained to specifically, it is necessary to trace through the following pattern of testimony.

Mrs. Maffett and Miss Rollison testified that Mrs. Mendelson had frequently taken excessively long lunch hours. Mrs. Maffett did not speak either to Mrs. Coleman or Mr. Freedman about them. Miss Rollison did speak to Mrs. Coleman about them, and testified that she had suggested that Mrs. Mendelson should be charging herself annual leave for the extra time spent on long lunch periods.

Mrs. Coleman testified that Miss Rollison had spoken to her about Mrs. Mendelson's failure to charge herself with annual leave, but had said nothing specifically about long lunch hours. Mrs. Coleman was not aware herself particularly of the long lunch periods. After her conversation with Miss Rollison, she had talked to Mr. Freedman about Mrs. Mendelson's failure to charge herself annual leave, without specifying why annual leave should be charged - presumably because she did not know why - except that the annual leave Mrs. Mendelson was then taking, which was the first annual leave she had taken since before January 1st, was not involved.

Mr. Freedman testified that he was unaware himself that Mrs. Mendelson was taking frequent long lunch hours, so he could not state that he had talked to Mrs. Mendelson about them, or advised her to charge herself annual leave for them. He also testified that he was unaware that excessive overtime claims were being made; Mrs. Coleman had said nothing to him about them, so presumably he had no reason to discuss this subject specifically with Mrs. Mendelson.

In summary, although it is clear that Mr. Freedman's conversation with Mrs. Mendelson was held as the direct result of what Mrs. Coleman had discussed with him, it appears from the testimony that he had not been put on notice either as to Mrs. Mendelson's alleged long lunch hours and their possible relationship to the charging of annual leave, or as to any allegation that she was putting in excess overtime claims. A question therefore remains as to what specifically the conversation could have been about, or how much detail could have been involved.

Mrs. Mendelson testified that the conversation had related to a number of office problems, of which office gossip and rumor about excess overtime claims being made by Mrs. Mendelson was only one; and that the discussion of overtime was very general, involving the overtime being put in by everyone in the office, rather than specifically by Mrs. Mendelson.

Whether as a result of Dr. Stoller's June 28 memo and Mr. Freedman's conversation or not, Mrs. Mendelson did begin to keep a detailed record of her time and attendance, including overtime, as of July 9th. She testified she realized she should have done this before but was unable to because of her many other duties, and the fact that she gave a lower priority to this than to other things. She had maintained this detailed record (i.e. - the spiral calendar-Exhibit V) only during July and for portions of August, and then, again because of the pressure of work, had not kept it up.

c. The third action cited by Dr. Stoller - the 2 days of annual leave not charged:

At the close of the pay period for June 10th-23rd, Mrs. Mendelson prepared a time and attendance report, showing she had been on 40 hours annual leave between June 11th-15th, and submitted it to Mr. Freedman for certification. Subsequently, and apparently on the same day, she prepared a revised report showing 24 hours of annual leave for June 11-13th, and that she had been present on June 14th-15th.

Mr. Freedman also certified this report, which she then submitted to Payroll Office. The original of the first report was apparently destroyed, but Mrs. Mendelson retained a carbon copy of it (Exhibit K), and at some time added the notation "instead used 2 days of leave left over from last year."

Mrs. Mendelson testified that the reason she had reduced the amount of annual leave she charged herself with was to compensate herself for leave she had lost at the end of the preceding leave year because she had been unable to take all of her accrued leave, over and above the 240 hours she was entitled to carry over, that year. She also stated that before the preceding leave year had ended, on January 7, 1962, she had discussed with Mr. Freedman the fact that she would lose some annual leave if she could not take it before the end of the leave year, and that she had formed the impression, perhaps erroneously, that Mr. Freedman had indicated she might be allowed to take it off without charging for it during the following leave year. The amount she believed she would lose was at least 16 hours. The annual leave she took in June, 1962, was the first she had taken that year, so it was her first opportunity to repay herself in this manner.

Mrs. Mendelson testified further that she did not realize a practice of making up for lost leave in this way was illegal, or even that she was doing anything wrongful, because she considered she was only claiming annual leave which was due her. At various Government offices where she had worked previously the practice which had been followed was that a record was kept of annual leave which was lost because of the limit on the amount which may be carried forward to a new leave year, and employees were permitted to take annual leave in the new year without its being charged against them. She identified the other Government offices involved, but refused to mention names of individuals who had participated in this kind of practice. The Committee agreed that she should not be required to do this.

Mrs. Mendelson also testified that she could not remember whether she had had a further conversation with Mr. Freedman in June when she submitted the revised time and attendance report to him.

In the voluntary statement submitted by Mr. Freedman to Mr. Haynes on November 21st (Exhibit I), he stated:

> 'When interviewed by Mr. Haynes on October 30, 1962, he asked me whether I had ever permitted Mrs. Kinzie to take leave without recording it on the time and attendance report. I told him that I didn't remember having ever permitted this to happen. When asked specifically whether I had ever permitted her to take leave without recording it to compensate her for leave which she forfeited at the close of the 1961 leave year, I told Mr. Haynes that it was my understanding that such a practice would be illegal; further I didn't remember having permitted her to do it but I didn't believe that I would have authorized her to do it. In further amplification subsequently, I stated that I did not think that I would deliberately, with forethought, prmit such an action. This is based on my personal concept of administrative practice, ethics and integrity, particularly where government property and financial matters are concerned, which I have adhered to in over 30 years of government service. I further stated that I have no recollection of any specific instance when this question was presented for decision; however, it is possible that some conversation on the subject, which I do not recall, might have occurred and was misunderstood or misconstrued."

Mr. Freedman also testified that he did not recall having authorized Mrs. Mendelson specifically to change her time and attendance report for June 10th-23rd so as to reduce the amount of annual leave charged; that he did not believe he would deliberately and with fore-

thought have authorized lost annual leave to be made up, since he knew that this would be illegal; that he could have done it inadvertently, or some conversation he may have had may have been misconstrued; that he recalled Mrs. Mendelson had advised him before the close of the preceding leave year that she was going to lose some annual leave, but that he could not remember any conversation he may have had about her being allowed to make it up, unless he had said something inadvertently which she might have misinterpreted; and that while he could not recall whether or not Mrs. Mendelson had informed him in June, 1962, that she was submitting a revised time and attendance report, he did not believe he would have signed the revised sheet if Mrs. Mendelson had brought it to his attention because he knew it would be illegal.

Mr. Freedman also testified that there was no practice followed in the Office of Applications under which anyone would be permitted to take off annual leave without charging it, either as compensation for overtime worked which was not paid for, or as compensation for annual leave which was lost because not taken in the right leave year.

d. Summary of testimony of Mrs. Mendelson's character witnesses:

(1) Commissioner Patterson testified that Mrs. Mendelson had worked for him as a secretary for about 60 days in the summer of 1961, while he was working as a consultant to Mr. Webb. He had found her to be an unusually competent employee and was particularly impressed by her willingness to work hard and to assume responsibility for getting a job done. She had worked many hours of overtime for him, both in the evenings and on weekends, and it was his impression that she was not a clock watcher or one who kept a careful book on the time she worked. On several occasions, she had asked him what amount of time she had worked on a preceding Saturday or Sunday.

Mr. Patterson also testified that he had been a Government employee for many years, having held such positions as Deputy Adminis-

trator of Veterans Affairs and Deputy Director of the Office of Defense Mobilization; that during this period he had hired or approved the hiring of hundreds of employees; that on the basis of his experience with Mrs. Mendelson he would hire her; that he felt he knew human nature well enough that if there had been any degree of intellectual dishonesty in Mrs. Mendelson he would have detected it in the time she worked for him; and that he had been shocked when he first heard of the allegations that she had falsified time reports and had volunteered to testify in her behalf.

Mr. Patterson had been so impressed with Mrs. Mendelson's ability and willingness to work hard that he had voluntarily spoken to Mr. Webb about her and had addressed a letter of commendation to her, in which Mr. Webb and Dr. Hagen had joined. (Exhibit L). Mr. Patterson testified that it was not his customary practice to give such commendations, and he did so only under rare circumstances.

On cross-examination, Mr. Patterson conceded that he had not had anything to do with the preparation or certification of Mrs. Mendelson's time and attendance reports, and therefore had no knowledge of the amount of overtime she had claimed during the period she had worked for him. He further testified that he had no detailed knowledge of the facts which had led to Mrs. Mendelson's dismissal.

(2) Colonel Smith testified that Mrs. Mendelson had worked for and with him intermittently over a period of about 14 months in 1960-61, while he was detailed to NASA. He had found her work eminently satisfactory, and was particularly impressed with her discretion and her sense of integrity. He had never had any reason to doubt her truthfulness or veracity, and he did not think she was a person who would deliberately try to defraud the Government. During 22 years of military service, Col. Smith had had a great deal to do with the appointment or employment of military and civilian personnel, and based on his experience over this period of time, he would unhestiat-

ingly employ Mendelson again. Colonel Smith would have given Mrs. Mendelson a commendation himself if he had thought it would do her any good. However, he had known that during the time Mrs. Mendelson had worked for him, her regular supervisor, Mr. Barnum, had given her a letter of commendation. This was introduced as Exhibit M.

On cross-examination, Colonel Smith conceded that he had not had anything to do with the preparation or certification of Mrs. Mendelson's time attendance reports, and that he had no detailed knowledge of the facts which led to Mrs. Mendelson's dismissal.

(e) Interrogations put to Dr. Morris Tepper by the parties:

In his answers to questions put to him by Mrs. Mendelson's Counsel (Exhibit X), Dr. Tepper indicated that he had known Mrs. Mendelson since the winter of 1961-62; that he had had an opportunity to observe the type of work she was performing for NASA: that several months previously he had offered her a position as his secretary; that he had knowledge of the charges which led to her dismissal as a NASA employee; and that, knowing the substance of the charges against her, he would still be willing to offer her employment as his secretary, after first discussing with her the importance of adhering accurately to Government regulations and procedures.

In his answer to the cross-interrogatories put to him by Management (Exhibit Y), Dr. Tepper conceded that he did not have any personal knowledge of Mrs. Mendelson's practices in filling out her time and attendance reports; that he did not have any independent means of determining whether such reports were false; that he did not have any facts which would lead him to conclude that Dr. Stoller's decision to recommend Mrs. Mendelson's dismissal was other than a valid dismissal; but that, on the other hand, he found it very severe that a maximum penalty was imposed for what appeared to be a first offense.

In its closing argument, Management commended in relation to Dr. Tepper's statements that he apparently did not realize that Mrs. Mendelson's dismissal was not the result of a first offense, but of a whole series of offenses extending over a period of many months.

IV. FINDINGS ON THE ISSUES

On the basis of the entire record before it in this appeal the Committee makes the following findings on the issues involved:

1. The appellant's allegations that procedural errors were committed in connection with her dismissal:

These allegations, which were set forth in the appellant's Notice of Appeal (Exhibit D) and have previously been referred to on page 16 of this report, were not pressed by the appellant or her counsel at the oral hearing or otherwise in the course of the appeal proceedings. The Committee considers that it would therefore be justified in finding that the allegations had been withdrawn or that any such procedural errors, if they were committed, had been waived by the appellant. However, the Committee has carefully reviewed each of the actions taken by Dr. Stoller and the NASA Headquarters Personnel Office in connection with Mrs. Mendelson's dismissal from NASA employment, and has determined that all of the relevant provisions of the applicable NASA regulations, NMI 17-7-23, 17-7-24, and 17-7-30, were fully observed. The Committee therefore finds that no procedural errors were committed by Management in connection with the disciplinary action taken against Mrs. Mendelson.

2. The 21 excess overtime claims:

a. The Committee finds that the weight of the evidence indicates that the 21 excess overtime claims, taken as a whole, were not the result of honest errors or mistakes as contended by Mrs. Mendelson, even though it may be conceded that one or more may have been. The

proportion of mistakes in Mrs. Mendelson's favor, as demonstrated by Management, is too great to permit the conclusion that all or most of them were honest mistakes.

In making this finding, the Committee has also taken into consideration that Management was able to cite additional instances of excess claims in Mrs. Mendelson's favor - such as those for March 4, 1962, and in the week of June 18th - which, while not a part of the 21 instances cited, tended to demonstrate further that the pattern of errors was consistently in Mrs. Mendelson's favor.

b. In connection with the foregoing finding, the Committee has also determined that the excess claims for September 30th, October 7th and October 13th, for which Mrs. Mendelson subsequently refunded the overtime pay received, were properly included in the total of 21 claims in her favor which were cited against her. The evidence on this point strongly supports Management's contention that Mrs. Mendelson was led to correct the errors involved for these three days only after it was demonstrated to her that the guard registers indicated she had not worked any overtime on the 3 days.

c. The Committee also finds that the mitigating circumstance alleged by Mrs. Mendelson as a reason for the excess claims were insufficient to explain or justify them. The task of keeping accurate time and attendance records is obviously not an onerous or time consuming one, and it is not possible to conclude that it was entirely the pressure or variety of Mrs. Mendelson's duties which kept her from maintaining such a record.

d. The Committee finds that Mrs. Mendelson apparently did work a substantial amount of extra time on weekdays which was not included in her overtime claims for those days. This is indicated by the entries on the spiral calendar record that she kept during portions of July and August, which show that she did customarily arrive at work well before 8:15 a.m. and frequently worked through all or part of her lunch period,

but that she ordinarily did not include the time represented by these actions in her daily overtime claims. Although this record was kept during only a very small period of the total time covered by the excess overtime claims, the number of entries involved is considered sufficient to establish a pattern indicating Mrs. Mendelson's customary work habits.

In making this finding the Committee considered the testimony that Mrs. Mendelson frequently spent the time before 8:15 a.m. in the lunchroom in FOB #6. To be balanced against this is her testimony that she ate breakfast in FOB #6 only during periods that Mr. Freedman was out of town, which would account for her meeting Miss Dibella in the lunchroom during late August or early September, when Mr. Freedman was absent for 3 weeks. The weight which can be given to Mr. Young's testimony on this point is affected to some degree by his statement that he had sometimes seen Mrs. Mendelson having breakfast with Miss Dibella in the period prior to mid-July, whereas Miss Dibella's testimony indicated that she had not met Mrs. Mendelson until sometime in August or September. Mr. Freedman was also absent for a total of four weeks between March 12th and June 15th, which would account for Mrs. Mendelson's presence in the lunch room on the days involved.

Mrs. Mendelson's testimony as to her breakfast habits was supported by Mr. Freedman's testimony that he frequently arrived at his office at or about 7:30 a.m. and ordinarily found Mrs. Mendelson there and working, or that very often she had completed work waiting for him if he did not arrive until 8:15 a.m.

The Committee also considered the testimony that Mrs. Mendelson habitually took long lunch hours, in connection with making this finding. The testimony to this effect was directly contradicted by Mrs. Yowell, and was not supported by Mrs. Coleman. Most important in this regard, however, was Mr. Freedman's testimony that he was not aware that Mrs. Mendelson took long lunch hours with any degree of frequency.

Since it is not credible that Mr. Freedman would have been unaware of it if Mrs. Mendelson had habitually taken excessively long lunch hours on two, three, or four days a week, the Committee concluded that Mrs. Maffett's and Miss Rollison's testimony involved extreme exaggeration.

e. The offense with which Mrs. Mendelson was charged by Dr. Stoller was falsification of time and attendance records. Although a fraudulent intent is not a necessary element of this offense, it is clear from Dr. Stoller's letter of charges and his letter of dismissal that by the very nature of the actions cited in connection with the 21 excess overtime claims, it was deemed to be a part of the offense charged that Mrs. Mendelson had submitted the 21 excess claims with the intent to obtain overtime compensation fraudulently. Similarly, in its closing brief, Management indicated that one of the issues the Committee would have to determine was whether Mrs. Mendelson had submitted excessive overtime claims with a fraudulent intent.

For her part, Mrs. Mendelson specifically denied, in her letter of reply to the allegations against her, and in her testimony, that she had fraudulently falsified her time and attendance reports for the purpose of obtaining overtime compensation.

The Committee had considerable difficulty in determining whether Mrs. Mendelson, in submitting excessive overtime claims, did so with the fraudulent purpose of obtaining additional overtime compensation. It was recognized that the finding that the 21 excess claims were not as a whole the result of honest mistakes tends to carry with it a finding that the excess claims were made with a fraudulent intent. On the other hand, the finding that Mrs. Mendelson apparently worked more extra time during the week than she claimed overtime for caused the Committee to question whether the 21 excess claims did not in fact result from Mrs. Mendelson's rationalization that she was working more overtime in the course of the week than she was regularly claiming, and therefore that in the aggregate she was claiming only as much

as she felt she was entitled to. Given the fact that she conceded that more often than not she guessed at the amount of overtime she should claim, there is a consistency to the supposition that consciously or subconsciously she included the extra hours worked in determining the total hours of overtime to claim. The impression made on the Committee by Mrs. Mendelson's general manner and mode of thinking also tends to support such a supposition.

In connection with this issue, the Committee also considered particularly the testimony of Commissioner Patterson and Colonel Smith, both of whom made strong impressions on the Committee by their statements of their belief in Mrs. Mendelson's honesty, veracity and integrity. Similarly, Mr. Freedman, who of all the witnesses at the hearing had the greatest opportunity to form a judgment about Mrs. Mendelson's character, indicated his belief in her honesty and truthfulness, and that he did not think the excess claims were made with an intent to defraud the Government.

The Committee finds on this issue that there is at least a reasonable doubt to be raised as to whether Mrs. Mendelson had a willful or fraudulent intent to obtain additional overtime compensation in connection with her filing of excess overtime claims.

3. Dr. Stoller's memo on overtime, and Mr. Freedman's conversation with Mrs. Mendelson:

a. The Committee finds that the June 28th memorandum on overtime was not directed to the accurate keeping of time and attendance reports. By its own terms, it does not purport to do this. Beyond this, Mr. Freedman, who conceived it and drafted it, stated without reservation that this was not its purpose.

The significance of this June 28th memo, insofar as it bears on the two main problems involved in the appeal, would not have seemed to the Committee to be very great. Nevertheless, Management consistently

relied on it as being an important factor in determining the seriousness of Mrs. Mendelson's violations, and the Committee has therefore found it necessary to take the question of the purpose of the memo into consideration.

b. The Committee finds that Mr. Freedman's conversation with Mrs. Mendelson about time and attendance records could not have been either specific or detailed, since he was apparently generally unaware at the time that there was a problem of long lunch hours or excess overtime claims. It appears very doubtful that this conversation could have involved such explicit instructions to Mrs. Mendelson that it should have been relied on by Dr. Stoller as a factor in his determination that any excess overtime claims made subsequent to the conversation constituted an aggravation of Mrs. Mendelson's wrongful actions.

4. The two days of annual leave which were not charged:

a. The Committee finds it to be credible that Mrs. Mendelson did not realize her action in not charging herself for the two days of annual leave was against the law, or even a serious wrongful act, because she thought she was only claiming annual leave which was due her, and because of the similar practice followed in other Government offices in which she had worked.

b. The Committee also finds it to be credible that Mrs. Mendelson believed she had an understanding with Mr. Freedman that this method of making up for her lost annual leave would be sanctioned by him. The Committee does not disbelieve Mr. Freedman's statements that he did not think he had said this to her, or that he would have said it, knowing it was against the law. Nevertheless, both the paragraph quoted herein from Mr. Freedman's voluntary statement (p. 49), and his testimony, appear too equivocal to permit the Committee to rule out as implausible Mrs. Mendelson's contention that she thought she had Mr. Freedman's approval to make up for the leave she would lose.

c. The question whether the falsification of the attendance report covering the two days of annual leave not charged for involved a fraudulent intent by Mrs. Mendelson was also brought into issue by Management in connection with this action. The first finding made by the Committee on this matter indicates its opinion that Mrs. Mendelson probably did not have an intent to make a fraudulent claim in this situation, but believed that she was only making up for leave which was in fact due her, and that this was a common practice, at least in other Government agencies. Also bearing on this question of intent is the fact that Mrs. Mendelson retained the carbon copy of the attendance report she prepared originally for the period involved, and even indicated on it that she had revised it to take credit for 2 days of annual leave lost from the preceding year. This fact suggests strongly that Mrs. Mendelson had no sense of wrong-doing, or purpose to commit a fraud, when she submitted the revised attendance report.

V. RECOMMENDATIONS OF THE COMMITTEE

In the light of the foregoing findings, and of all the circumstances involved in this appeal, the Committee is of the opinion that the penalty of dismissal from NASA employment was too severe, and therefore that the action taken to dismiss Mrs. Mendelson should be rescinded. This conclusion has been reached for the following reasons:

1. That there is ground for at least a reasonable doubt whether Mrs. Mendelson deliberately falsified the 21 excess overtime claims for the purpose of collecting additional compensation fraudulently, or whether, as suggested in the Committee's finding, the claims were made up largely through guesswork, but took into account her feeling that she was in fact putting in more extra time at her job than she normally claimed overtime for, and therefore that in the aggregate she was claiming only as much overtime as she believed she was entitled to.

2. That Dr. Stoller's memo of June 28th on overtime, and Mr. Freedman's conversation with Mrs. Mendelson, had no real bearing on the gravity of the offenses she committed, and therefore should not have been considered by Dr. Stoller, as they apparently were, in determining what an appropriate penalty would be for Mrs. Mendelson's offenses.

3. That again there is reasonable doubt whether Mrs. Mendelson realized she was doing an illegal or even wrongful act in failing to charge herself for the two days of annual leave, and whether she did not in fact believe that she had Mr. Freedman's approval to make up for her lost leave in this way.

In connection with the first and third points above, it may be noted that the Committee does not believe that Management was necessarily required to prove beyond a reasonable doubt that Mrs. Mendelson was guilty of the violations alleged. It is believed, however, that where factors of reasonable doubt are present, they should be considered at least in connection with the determination of the degree of the penalty to be given for an offense. For this reason, the Committee is of the opinion that the reasonable doubts which exist on the several issues in this appeal furnish a basis for mitigation of the penalty set by Dr. Stoller.

The Committee also considered as mitigating factors bearing on the degree of the penalty, Mrs. Mendelson's long period of Government service, during which she has not been charged with any other offenses; the highly favorable opinions held of her by men she has worked for or with, particularly with respect to the reputation she established with them of being an honest and truthful person, and the fact that they would be prepared even now to employ her; and her record of having

been given satisfactory employee efficiency ratings throughout her Government career. [14]

On the other hand, in concluding that the action taken to dismiss Mrs. Mendelson from NASA employment should be rescinded, the Committee has not lost sight of the fact that Mrs. Mendelson committed a number of very serious violations, which cannot be condoned, and should not be excused. Mrs. Mendelson's practices in connection with filing her overtime reports displayed at least flagrant carelessness, inefficiency, poor judgment, and a disregard for following good office procedures and methods. By virtue of her long Government experience, her high civil-service grade, and her reputation for being a well-trained and reliable secretary, Mrs. Mendelson should not have been guilty of these things. Similarly, her failure to charge herself for two days of annual leave was a serious breach of conduct, notwithstanding any similar practices which may be followed in other Government agencies, so long as she lacked a clear and explicit authorization from Mr. Freedman that she would be permitted to do this.

For the above reasons, the Committee feels that Mrs. Mendelson deserves to receive a substantial penalty for her actions, but that it should be less than dismissal. Accordingly, the Committee recommends unanimously that the final decision on Mrs. Mendelson's appeal should be that the action taken to dismiss her from NASA employment should be rescinded, and that in lieu of dismissal she should be sus-

---

[14] A principal issue raised by Mrs. Mendelson's Counsel in the hearing was whether her dismissal would promote the efficiency of the Federal service, in view of her record of satisfactory service and the favorable opinions her former supervisors had of her abilities. Mr. Dawson argued that 5 U.S.C. 652 provides that no employee in the classified civil service may be removed therefrom except for such cause as will promote the efficiency of the service. In view of the Committee's recommendations in this appeal, it is considered unnecessary that a determination be made on Mr. Dawson's argument on this issue.

pended from duty without pay for a period not to exceed 120 days, commencing as of January 6, 1963, which was the effective date of the dismissal action.

/s/ E. M. Shafer
Chairman

/s/ Peggy Christian
Member

/s/ Robert J. Gutheim
Member

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
WASHINGTON 25, D.C.

Exhibit A

IN REPLY REFER TO:

December 5, 1962

Mrs. Agatha Kinzie
Program Review and
Resources Management
Office of Applications
NASA Headquarters
Washington 25, D. C.

Dear Mrs. Kinzie:

This letter constitutes your official advance notice that we propose to remove you from the Federal Service not earlier than close of business January 6, 1963. This letter is issued in accordance with current Civil Service regulations and NASA Management Instruction 17-7-24. We are proposing your removal because you have falsified official time and attendance reports and fraudulently obtained overtime compensation.

An investigation was recently completed by the Inspections Division, Office of Administration, NASA, with respect to overtime work performed by you. During this investigation, you were interviewed by Mr. Charles G. Haynes and Mr. A. W. Sanders of the Inspections Division. The facts concerning the specific violations listed below were obtained from a review of official records and from interviews conducted and voluntary statements obtained during the investigation. You are charged with the following specific actions:

a. During the period between January 27 and May 30, 1962, you claimed overtime work in excess of the time you were recorded as being present for duty on 11 specific occasions. The specific dates and times involved are contained in Attachment #1 to this letter. Based on the information contained in the Guard Register maintained in FOB#6, which records the times you entered and left the building on these specific occasions, it is concluded that you claimed at least 16 hours and 41 minutes of overtime work in excess of the time you were actually present for duty on those days. On each occasion, you recorded this information on the time and attendance reports (SF 1130) for the pay periods in question, and you presented

these erroneous reports to your supervisor for certification, representing them to be accurate and correct in all respects.

b. On June 28, 1962, I issued a memorandum on the subject of overtime, stressing the need for reducing the amount of secretarial overtime required and emphasizing the importance of keeping a close watch on the actual usage of overtime. Both you and Mr. Carl Freedman, your supervisor, participated in the preparation of that memorandum. You were well aware, therefore, both of my desire to control the abuse of overtime and of the necessity for control. In addition, in a signed and certified statement on file in the Inspections Division, Mr. Carl Freedman states that several months prior to October 1962 he discussed this matter with you very explicitly and advised you of the necessity of keeping accurate time and attendance records. You admit being a party to this discussion.

c. Between June 30 and October 13, 1962, you claimed overtime in excess of the hours you are recorded as being present for duty on 10 specific occasions. The specific times and dates covering these instances are listed in Attachment #2 to this letter. Based on a review of the Guard Register maintained in FOB#6, which reflects the times you signed in and out of the building on these occasions, you claimed at least 28 hours and 45 minutes of overtime work in excess of that which you performed. For the pay periods in question, you included these excess overtime claims on time and attendance reports (SF 1130), which you then presented to your supervisor for certification, representing them to be accurate and correct in all respects.

d. During the period between May 31 and June 15, 1962, you were on leave visiting your daughter in Iowa. You returned to the office on Monday, June 18, 1962. You initially prepared your time and attendance report covering the period June 10 through June 23, 1962, reflecting that you were on leave for five work days during the week of June 10. Subsequently, however, you revised the time and attendance report for this period to show that you were in duty status on June 14 and 15. The revised time and attendance report was incorrect, and therefore constituted falsification.

In performing the actions described above, you have committed an offense listed in the "Table of Disciplinary Offenses and Penalties for Employees in NASA" contained in NASA Management Instruction 17-7-23 entitled "Discipline". Specifically, you are guilty of offense

number four: "Falsifying attendance record for oneself or another employee". This offense is punishable by disciplinary action up to and including removal. Considering the number of occasions on which you falsified time and attendance records, and considering that you were warned in advance concerning the necessity for keeping accurate records of actual overtime work performed, removal is considered warranted.

If you consider this action unwarranted, you may reply within ten calendar days following your receipt of this letter. Your reply may be submitted in writing, or you may reply to me in person. If you so desire, you may reply both personally and in writing. If you decide to reply, your reply should contain the specific reasons why you feel removal action is not justified, and you should offer evidence or proof in support of such reasons. Your reply, if submitted, will be taken into careful consideration before a final decision is made. Whether or not you reply, you will receive a notice of final decision before action is taken.

You also have the right to request a hearing under the provisions of NASA Management Instruction 17-7-30. If you desire a hearing before a final decision is rendered, you should submit your request within ten calendar days following your receipt of this letter. Your request for a hearing, if you submit one at this time, should be addressed to Mr. Albert F. Siepert, Director of Administration, NASA, and should refer specifically to this letter. If you do not exercise your right to a hearing at this time, and if my decision in this case is adverse to you, you will have an opportunity for a hearing following the receipt of my decision. If you exercise your right to a hearing prior to the decision, however, you will not be entitled to a second hearing by NASA.

If you require advice or assistance regarding your rights as a Federal employee or regarding the procedures involved in this matter, you may consult with Mr. Donald L. Gloss, of the Headquarters Personnel Office. You may obtain an appointment with Mr. Gloss by telephoning 13 x21926.

During your notice period, you will continue in duty status, unless you request and obtain approval for leave.

Sincerely,

Morton J. Stoller
Director
Office of Applications

Attachments

Attachment 1

Record of Excess Overtime Claims Between January 27 and May 30, 1962

Date - 1962		Guard Register Records In	Out	Time	O/T Hours Claimed by you on T & A Rpt.	Excess Claimed
1/27	Sat	8:55a	3:15p	6:20	7:30	1:10
3/3	Sat	10:20a	2:15p	3:55	5:00	1:05
3/10	Sat	11:05a	3:07p	4:02	7:00	2:58
3/17	Sat	10:15a	1:35p	3:20	5:00	1:40
3/24	Sat	10:50a	1:10p	2:20	4:00	1:40
3/31	Sat	10:50a	3:20p	4:30	5:30	1:00
4/7	Sat	10:30a	4:45p	6:15	7:00	:45
4/21	Sat	10:10a	4:35p	6:25	7:30	1:05
5/5	Sat	10:50a	4:00p	5:10	7:30	2:20
5/26	Sat	11:35a	2:52p	3:17	4:00	:43
5/30	Hol	8:45p	10:00p	1:15	3:30	2:15

Attachment 2

Record of Excess Overtime Claims Between June 30 and October 13, 1962

Date - 1962		Guard Register Records In	Out	Time	O/T Hours Claimed by you on T & A Rpt.	Excess Claimed
6/30	Sat	---	---	---	4:00	4:00
7/14	Sat	11:00a	2:15p	3:15	5:00	1:45
8/4	Sat	11:10a	1:10p	2:00	3:00	1:00
8/25	Sat	9:00a	1:30p	4:30	5:00	:30
9/8	Sat	9:15a	11:30a	2:15	4:00	1:45
9/15	Sat	9:30a	12:15p	2:45	4:00	1:15
9/30	Sun	---	---	---	6:00	6:00
10/6	Sat	8:30a	3:00p	6:30	7:00	:30
10/7	Sun	---	---	---	4:00	4:00
10/13	Sat	---	---	---	8:00	8:00

JA 56

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION **Exhibit C**
WASHINGTON 25, D.C.

IN REPLY REFER TO:

December 27, 1962

Mrs. Agatha L. Mendelson
Program Review and
Resources Management
Office of Applications
NASA Headquarters
Washington 25, D. C.

Dear Mrs. Mendelson:

This letter constitutes your notice of decision in the matter of your proposed removal. It is issued in accordance with current Civil Service regulations and applicable NASA Management Instructions.

In my letter of December 5, 1962, I advised you that we proposed to effect your removal from the Federal Service not earlier than January 6, 1963. My letter explained in detail the reasons for proposed removal action, and it contained specific charges that you had falsified Time and Attendance Reports during calendar year 1962 in order to obtain overtime compensation fraudulently. You replied to my letter of proposed removal in a letter dated December 11, 1962. I have reviewed your reply very carefully in order to arrive at a fair decision. I have also had the information contained in and attached to your letter of reply carefully checked against official records and the investigative file in this matter. It is my conclusion that your reply does not effectively refute the charges contained in my letter of December 5, for the following reasons:

a. You claim that there were mitigating circumstances involved in that the amount of workload and pressure in your job caused errors and discrepancies in your time and attendance reporting. I am aware of the significant workload during the initial build-up and organization of the Office of Applications. While these conditions might help to explain any honest errors which occurred prior to June 28, 1962, they do not provide a satisfactory explanation to me of the pattern of excessive claims for which you were responsible. In the face of the emphatic instructions contained in my memorandum of

June 28, 1962, there is absolutely no excuse for any erroneous overtime reporting subsequent to that date.

b. You claim estimated hours of overtime worked which you did not report on the Time and Attendance Reports. The attachment to your letter of reply dated December 11, 1962, lists 42 hours and 20 minutes of such estimated overtime which you claim you worked but did not report on the day such overtime was performed. This information contained in the attachment to your letter of reply does not correspond with much of the information contained in your calendar notes (both the spiral notebook and the loose leaf notebook) which you gave to Mr. Haynes for the investigative file. Your calendars do not contain any entries for many of the dates you now claim you worked overtime, and you advised Mr. Haynes you have no other records. I must assume from your reply that you feel that your estimated overtime which you did not claim during regular workdays justified you in making false claims for Saturdays and one holiday. NASA Time and Attendance regulations and procedures do not permit accumulations and transfer of time from one day to another for overtime claim purposes.

c. You claim in your letter of reply that during the months of July and August 1962, following receipt of my memorandum dated June 28, 1962, that you "did maintain a pretty complete record of all time and attendance and overtime" on your calendar diary. There are over ten specific discrepancies between the information submitted in the attachment to your reply, official time and attendance records, Guard Registers and your calendar notes for this two-month period.

d. You claim that the erroneous overtime reporting was essentially a series of "honest mistakes". Of all the Saturday, Sunday and holiday overtime which you claimed between January and October of 1962, which can be verified against independent records, however, only one claim appears to be a "mistake" in favor of the Government. Twenty-one of these week-end overtime claims were in your favor and resulted in a monetary advantage to you.

e. You claim that when you received your overtime check which included payment for overtime work allegedly performed on September 30, October 7 and October 13, 1962, you "realized

that something was wrong". You would lead us to believe that you first discovered the excessive claim, and on your own initiative you called Mrs. Millie Morris of the Payroll Office in order to resolve the discrepancy. As a matter of fact, you received the overtime check on October 24, 1962. You were interviewed by Mr. Charles G. Haynes of the NASA Inspections Division on October 25, 1962, at which time you initially contended your report for those days was correct. Mr. Haynes advised you at that time that the Guard Registers for these three days did not correspond with your overtime claim, and you then admitted discrepancies existed but made no mention at that time of having an uncashed check. It was following your discussion with Mr. Haynes that you called him to suggest you might return the check to have the excessive amount removed.

f. You claim that the improper reporting pertaining to your annual leave on June 14 and 15, 1962, was a result of your past experience in other Government agencies. You alleged that it was an accepted practice "at previous government offices" in which you were employed to take care of forfeiture leave in this manner, and that you did not realize that such a practice was illegal. I cannot believe that an individual who has more than 11 years of Government service holds such a view or is ignorant of the law in this respect.

Accordingly, I must conclude that you do not satisfactorily answer the charges contained in my letter of December 5, 1962. Your reply does not refute the facts contained in subparagraphs a through d of my letter. I must conclude, therefore, that you did violate established instructions regarding time and attendance reporting, that you falsified your overtime reports, and that you thus obtained overtime compensation fraudulently. In accordance with the governing provisions of the "Table of Offenses and Penalties for Employees in NASA", attached to NASA Management Instruction 17-7-23, a penalty up to and including removal is authorized. I consider the magnitude of your offenses to warrant this severe penalty. Accordingly, it is my decision that you will be separated from the Federal Service effective close of business January 6, 1962, in order to promote the efficiency of the Service.

In a separate letter you will be advised of action which will be necessary for you to repay the overtime compensation which you received erroneously. Because you took action to correct certain time and attendance records after the investigation was initiated and you were made aware of the discrepancies, it is not possible at this

time to advise you specifically of the amount which you will have to repay. When the records have been reviewed carefully, and a specific determination has been made as to the amount of repayment, you will be so advised. Your final pay check will be withheld until such action is completed, and if this amount is not sufficient, an adjustment will be made against your retirement account.

If you feel this action is not warranted, you have certain rights of further appeal. Initially, you may appeal either to the Associate Administrator of NASA or to the Civil Service Commission. The specific details regarding these appeal rights are outlined in the following subparagraphs. If you decide to take advantage of these appeal rights, there are certain general requirements which must be met. Any appeal must be submitted in writing. It must contain the specific reasons for contesting the removal action. It should also indicate that you are willing and able to submit proof or evidence in support of your appeal. In addition, appeals must be submitted within the time limits specified. Following is a further explanation of these appeal rights:

a. You may appeal this action initially to the Associate Administrator of NASA, provided you take such action within ten calendar days following the effective date of your removal. If you desire, you are entitled to a formal hearing, as a part of this appeal. The provisions governing a formal hearing are described in NASA Management Instruction 17-7-30. If you submit your initial appeal within NASA, and you desire a formal hearing, you should so state in your letter of appeal. If you appeal initially within NASA, and a decision on your appeal is not made by the time 60 calendar days have elapsed, you may elect to terminate your appeal to NASA and submit it to the Civil Service Commission.

b. You may appeal this action initially to the Civil Service Commission by addressing your letter to the Chief, Appeals Examining Office, U. S. Civil Service Commission, Washington 25, D. C. If you appeal to the Civil Service Commission, you must submit your letter within ten calendar days after the effective date of your removal. If you elect to appeal initially to the Civil Service Commission, you will not be entitled to an appeal within NASA.

c. If you appeal initially within NASA and the decision on your appeal is adverse to you, you will have a further right of

appeal to the Civil Service Commission. In this event, your appeal must be submitted within ten calendar days following receipt of a notice of decision on your NASA appeal.

If you require additional advice concerning your rights or the procedures available to you for reconsideration of this action, you may contact Mr. Donald L. Gloss in the Headquarters Personnel Office. Should you desire to consult with Mr. Gloss, you may arrange for an appointment by calling 13 X21926.

Between now and the effective date of your removal, you will remain in duty status unless you request and obtain approval for leave.

Sincerely,

Morton J. Stoller
Director
Office of Applications

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
WASHINGTON 25, D.C.

IN REPLY REFER TO:

MAY 27 1963

Mrs. Agatha L. Mendelson
1400 Joyce Street South
Arlington 2, Virginia

Dear Mrs. Mendelson:

On December 27, 1962, you were served with written notice, pursuant to the provisions of NASA Management Instruction 17-7-24, of your dismissal in connection with charges to the effect that you had submitted false time and attendance reports. You exercised your right to appeal this adverse action within this agency, and your appeal was heard by an ad hoc hearing committee which rendered its report on May 15, 1963. After a review of this report and consideration of the findings of fact and recommendations contained therein, I have determined that the removal action should stand.

From my review of the Committee report and the evidence contained therein, I have concluded that the submission of false time and attendance reports by you constituted the kind of dereliction of duty that is a serious offense against good morale and discipline. In light of the nature of this offense, I find that, despite the factors that led the Committee to recommend that your punishment be mitigated, your removal will promote the efficiency of the Federal service.

In accordance with Part 22 of the Civil Service Regulations, you may appeal this action to the Civil Service Commission by addressing your appeal to the Chief, Appeals Examining Office, U.S. Civil Service Commission, Washington 25, D.C. Your appeal must be in writing and must set forth your reasons for

contesting this action, with offer of proof and such pertinent documents as you are able to submit. If you appeal to the Commission, you must submit your letter within ten calendar days after the receipt of this letter.

Sincerely yours,

Robert C. Seamans, Jr.

Robert C. Seamans, Jr.
Associate Administrator

Exhibit D

[Received June 7, 1963]

BEFORE THE UNITED STATES
CIVIL SERVICE COMMISSION

In Re: Appeal of AGATHA L. MENDELSON, nee Agatha Kinzie, GS-7 Secretary to the Director of Program Review and Resources Management and Office of Applications, National Aeronautic and Space Administration.

NOTICE OF APPEAL

NOTICE OF APPEAL IS TIMELY GIVEN that the undersigned, Agatha L. Mendelson, hereby appeals to the Appeals Examining Office of the United States Civil Service Commission from the decision of Robert C. Seamans, Jr., Associate Administrator of the National Aeronautics and Space Administration, rendered on May 27, 1963 discharging the undersigned as an employee of the said Space Administration.

This appeal is predicated upon the following grounds:

1. That the decision of the said Robert C. Seamans, Jr., Associate Administrator, is contrary to the evidence adduced at the hearing before the special board of the National Aeronautics and Space Administration in that there is no evidence showing that the discharge of the undersigned as an employee of the United States government would promote the efficiency of the service as required under Title 5 USC 652; and upon the further grounds alleged as follows:

2. Upon information and belief the said Robert C. Seamans, Jr., Associate Administrator, did not read the entire record of the hear-

ing held by the three panel board taking testimony in the matter of the appeal of the undersigned.

3. That the said Robert C. Seamans, Jr., Associate Administrator, disregarded the recommendations of the panel of three who heard the hearing in the matter of the charges against the undersigned.

4. That the evidence adduced at the hearing before the three panel board, and the facts proven on the alleged charges against the undersigned, did not, under the regulations of the National Aeronautics and Space Administration, justify any penalty other than a reprimand.

5. That in adjudicating the dismissal of the undersigned as an employee of the United States, consideration was not fully given to the eleven years of efficient service which the undersigned had rendered for the United States government, and that the said Administrator failed to consider the evidence of the witnesses offered by the undersigned to the effect that her services were eminently proficient and that her discharge would not promote the efficiency of the service, and that there is no evidence offered at the said hearing which would justify any decision that her discharge would promote the efficiency of the service.

6. That the said Administrator failed to properly evaluate the testimony of John S. Patterson, Colonel Wilfred J. Smith and Carl Freedman, all of whom have worked with the undersigned and had considered her a proper and efficient employee of the United States, and there was no testimony to the contrary.

Request is made for a personal hearing before the Examining Office at which the undersigned may appear with her counsel of record and offer testimony both oral and documentary in support of her appeal. Claude L. Dawson, Attorney at Law, 1049 Shoreham Building, Washing-

ton 5, D.C., is hereby designated as the representative of the undersigned, and it is requested that due and timely notice of the time and place of the requested hearing be given to the undersigned and to her representative.

Dated this 6th day of June, 1963.

AGATHA L. MENDELSON
1400 Joyce Street
Arlington, Virginia

CLAUDE L. DAWSON
1049 Shoreham Bldg.
Washington 5, D.C.
Representative for Mrs. Agatha L. Mendelson.

[Aug 6, 1963]

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS EXAMINING OFFICE
WASHINGTON 25, D.C.

FINDING AND RECOMMENDATIONS

APPEAL OF AGATHA L. MENDELSON UNDER PART 22, SUBPART B OF THE CIVIL SERVICE REGULATIONS

Appeal of a removal from the position of Secretary (Typing) GS-7, $5910 per annum, National Aeronautics and Space Administration, Washington, D.C., effective January 6, 1963.

INTRODUCTION

A final decision to effect the appellant's removal, effective January 6, 1963, was issued on December 27, 1962. An appeal was initially filed with the employing agency under the provisions of Part 77 of the Civil Service regulations. A decision on that appeal was given Mrs. Mendelson by letter of May 27, 1963. An appeal to the Civil Service Commission on Mrs. Mendelson's behalf was received on June 7, 1963. Evidence and representations were accepted from both parties to the appeal, including the record compiled during the processing of the

initial appeal in the agency. A hearing before a Commission representative was held on July 11, 1963. The appellant was present, accompanied by her representative, Mr. Claude L. Dawson, Attorney at Law, The agency was represented by Mr. Charles G. Hayes, Director of Inspections.

ANALYSIS AND FINDINGS

We find that Mrs. Mendelson was entitled to appeal her removal to the Commission under Part 22 of the regulations and that her appeal, filed within ten days of her receipt of an initial decision on the appeal to the employing agency, was timely.

Action in this case was initiated by an advance written notice dated December 5, 1962 which proposed the appellant's removal:

> ". . . because you have falsified official time and attendance reports and fraudulently obtained overtime compensation.
>
> "An investigation was recently completed by the Inspections Dicision, Office of Administration, NASA, with respect to overtime work performed by you. During this investigation, you were interviewed by Mr. Charles G. Haynes and Mr. A. W. Sanders of the Inspections Division. The facts concerning the specific violations listed below were obtained from a review of official records and from interviews conducted and voluntary statements obtained during the investigation. You are charged with the following specific actions:
>
> a. During the period between January 27 and May 30, 1962, you claimed overtime work in excess of the time you were recorded as being present for duty on 11 specific occasions. The specific dates and times involved are contained in Attachment #1 to this letter. Based on the information contained in the Guard Register maintained in FOB #6, which records the times you entered and left the building

on these specific occasions, it is concluded that you claimed at least 16 hours and 41 minutes of overtime work in excess of the time you were actually present for duty on those days. On each occasion you recorded this information on the time and attendance reports (SF 1130) for the pay periods in question, and you presented these erroneous reports to your supervisor for certification, representing them to be accurate and correct in all respects.

b. On June 28, 1962, I issued a memorandum on the subject of overtime, stressing the need for reducing the amount of secretarial overtime required and emphasizing the importance of keeping a close watch on the actual usage of overtime. Both you and Mr. Carl Freedman, your supervisor, participated in the preparation of that memorandum. You were well aware, therefore, both of my desire to control the abuse of overtime and of the necessity for control. In addition, in a signed and certified statement on file in the Inspections Division, Mr. Carl Freedman states that several months prior to October 1962 he discussed this matter with you very explicitly and advised you of the necessity of keeping accurate time and attendance records. You admit being a party to this discussion.

c. Between June 30 and October 13, 1962, you claimed overtime in excess of the hours you are recorded as being present for duty on 10 specific occasions. The specific times and dates covering these instances are listed in Attachment #2 to this letter. Based on a review of the Guard Register maintained in FOB #6 which reflects the times you signed in and out of the building on these occasions, you claimed at least 28 hours and 45 minutes of overtime work in excess of that which you performed. For the pay periods in question, you included these excess overtime claims on time and attendance reports (SF 1130), which you then presented to your supervisor for certification, representing them to be accurate and correct in all respects.

d. During the period between May 31 and June 15, 1962, you were on leave visiting your daughter in Iowa. You returned to the office on Monday, June 18, 1962. You initially prepared your time and attendance report covering the period June 10 through June 23, 1962, reflecting that you were on leave for five work days during the week of June 10. Subsequently, however, you revised the time and attendance report for this period to show that you were in duty status on June 14 and 15. The revised time and attendance report was incorrect, and therefore constituted falsification."

The advance notice provided the appellant with the reasons, specifically and in detail, for the proposed action as is required by the regulations. The appellant was given ten days to reply personally or in writing, or both personally and in writing. She made a written reply by letter dated December 11, 1962.

After consideration of the representations made in writing, the agency advised Mrs. Mendelson, by letter dated and delivered on December 27, 1962, of its decision to effect her removal for the reasons given in the advance notice of December 5, 1962. The notice of final decision properly advised the appellant of her appeal rights and of her right to continue in an active duty status until the effective date of the removal action. The removal was effected on January 6, 1963.

From the record indicated above, it is found that the removal action was taken in compliance with the procedural requirements of Part 22 of the regulations.

In considering the merits of the appeal, we recognize that the reason given for the appellant's removal consists of two parts; (1) that she falsified time and attendance records and (2) fraudulently obtained overtime compensation. It seems clear that the intent was to charge, with respect to the matters covered in paragraphs a. and c. of the advance notice, that the appellant deliberately and purposefully falsified the records to secure compensation to which she was not entitled.

Of the four narrative paragraphs given by the agency as specific charges, paragraph b. alleges no particular offense by the appellant and is not, therefore, in the nature of a specification. The matters related in this paragraph do have significance, in the view of the agency, as showing that, after having been warned, the appellant persisted in the practice of submitting false claims for overtime work.

With respect to paragraph b., it seems clear that the memorandum referred to did not relate to the appellant's time and attendance records and did not constitute any kind of warning to her about her manner of claiming or reporting overtime. As to the discussion described in this paragraph, the appellant contends that the discussion was quite general and that a rumor that her overtime claims were erroneous was only one of several things covered in the discussion. The appellant's former supervisor, Mr. Freedman, was questioned at some length concerning this matter during the hearing on the agency appeal. At that time his testimony, particularly during cross examination, was somewhat less positive than that given in his statement to an agency investigator on November 21, 1962. In any event, the appellant admits that rumors that her overtime claims were excessive were discussed; she has also testified that for a period of some two months following the discussion with Mr. Freedman, she made an effort to maintain an accurate record of overtime worked.

On all the evidence, we conclude that the appellant was on notice, as of late June 1962, that the accuracy of her time and attendance records had been questioned and that she recognized a requirement for accurate and truthful reporting of her overtime.

With respect to specifications a. and c., the record clearly shows that the time and attendance prepared by the appellant reported overtime for the dates listed which was erroneous. No question has been raised concerning the accuracy of the guard registers which show that,

on the 21 weekends and holidays, the appellant was either not in the building or was there for a substantially shorter time than is claimed as overtime.

Question has been raised concerning the propriety of including three of the dates in specification c., September 30, October 6, and October 13. It is claimed that when the appellant received her salary check including overtime pay for three days she recognized that an error had occurred, that she did not cash the check, and that she later took steps to refund the excess payment. The evidence does not clearly establish whether the appellant recognized the error on her own motion or whether she did so as a result of an interview with an agency investigator during which she was informed that evidence had been secured showing she had falsified her records with regard to overtime. In any event, the fact that error was recognized and recovery effected is not considered to invalidate the charge with respect to these dates. Clearly, the appellant did submit false records of overtime for these dates; clearly, payment was tendered on the basis of the erroneous claims.

The appellant has steadfastly maintained that the erroneous claims for overtime on weekends and holidays did not represent deliberate falsification. She has pointed out that, during the period in question, there was an unusually heavy workload in her office, that she was called upon to assume many responsibilities going beyond the normal requirements of her job, that she did not have the time to maintain accurate records of overtime worked, and that the erroneous claims were simply honest mistakes resulting from the absence of accurate records. Evidence and testimony from persons with and for whom the appellant has worked has been introduced attesting to her competence as an employee and to her good reputation for honesty, integrity, and truthfulness.

The appellant's competence as a secretary is not at issue and is not a matter for consideration in the current appeal. The opinion of the witnesses as to the appellant's honesty and integrity has little weight as evidence since none of the character witnesses profess any direct personal knowledge of the circumstances leading to the appellant's removal.

There is no question that the organization in which Mrs. Mendelson worked was unusually busy. It is conceded, also, that she was called upon to perform many functions not usually assigned to a secretary. However, the responsibility for maintaining time and attendance records was one which might normally be assigned to her as a secretary. The evidence shows that other employees for whose records Mrs. Mendelson was responsible did keep records of their overtime and there is no indication that their claims have been questioned. Furthermore, the record indicates that the appellant was permitted to work such amounts of overtime as she considered necessary to complete her duties. On all the evidence, we cannot conclude that this activity in the office and the demands placed on the appellant represent a valid explanation of her failure to maintain and submit accurate and truthful records of her own overtime.

The appellant has also testified that she generally reported for work before the official opening hour, remained at work long after the official closing time, and frequently did not take the one half hour officially allowed for lunch. She has presented a tabulation purporting to show that the uncompensated overtime she performed on regular work days was in excess of the erroneous claims shown in the advance notice of proposed removal.

The evidence presented does not conclusively establish the extent to which the appellant may have performed overtime during her regular work week without compensation. Assuming that there may have been days when she worked more hours than she reported, this would

not necessarily indicate that her excessive claims on weekends were honest error. A more logical conclusion would be that excessive claims were deliberately made to offset the unclaimed overtime.

In support of its conclusion that the appellant's falsification of records was deliberate, the agency has pointed out that the pattern of erroneous reporting is consistently in favor of the appellant. In this connection, the record shows that of some thirty-five weekends and holidays on which the appellant reported overtime, the claim was less than she might properly have reported in only one instance. Furthermore in those few instances where the overtime reported on regular work days is susceptible to verification and shown to be erroneous, the error is consistently in favor of the appellant.

On review of all the record, we find that the pattern of error is such as to lead to a reasonable conclusion that the appellant did purposefully falsify her time and attendance record and fraudulently obtain overtime compensation.

With regard to specification d., the file shows that the appellant first submitted a time and attendance record showing herself in an annual leave status on June 11, 12, 13, 14 and 15, 1962 and later submitted an amended record erroneously showing that she was in an active duty status on June 14 and 15. She has explained that, in other offices in which she worked, employees who lost annual leave were allowed to recoup the lost leave in the succeeding leave year. She states that she was unable to use all her leave during the 1961 year, that she discussed the matter with her supervisor, Mr. Freedman, and understood that she would be permitted to use the leave lost during 1961 during the 1962 leave year.

Mr. Freedmen has testified that he did not authorize the appellant to use the leave lost in 1961 during 1962 and would not have done so had he been asked. He has conceded, however, that the appellant may have misconstrued something he said as implying his concurrence.

Whatever may have been the practice in other offices, the appellant's action in showing herself on active duty status while she was on leave constitutes falsification of the time and attendance record. Clearly she was not entitled to recover any leave she may have lost in the previous year. In the absence of any clear showing that her action was authorized or approved, we must conclude that the record was deliberately falsified.

In the appeal to the Commission, the appellant has raised a number of questions as to the merits of the decision on her appeal to the employing agency. On review of the record in light of these questions, we find no error which would in any way affect the decision on the merits of the appeal to the Civil Service Commission.

On review of all the record, we find that the reasons given for the appellant's removal are substantiated by the evidence, that the agency's decision to remove was not arbitrary, unreasonable, or capricious and that the removal was an action taken for such cause as will promote the efficiency of the service.

RECOMMENDATION

It is recommended that no change be made in the personnel action of the National Aeronautics and Space Administration in effecting the removal of Mrs. Mendelson on January 6, 1963.

This recommendation becomes a final decision of the Civil Service Commission unless either the appellant or the employing agency files an appeal with the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D.C., within seven (7) days of receipt of this decision.

Section 22.402 of the Commission's regulations provides that such an appeal must be in writing setting forth the basis for the appeal.

Since there is no further right to a hearing, additional representations (if any) should be made in writing and submitted in duplicate with the appeal to the Board.

L. S. Mapes, Acting Chief
Appeals Examining Office

[Nov. 8, 1963]

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D.C.

Mr. Claude L. Dawson
Attorney at Law
810 - 18th Street, NW.
Suite 307
Washington, D.C. 20006

Dear Mr. Dawson:

Reference is made to your further appeal in behalf of Mrs. Agatha L. Mendelson from the decision of the Commission's Appeals Examining Office sustaining, under Part 22 of the Civil Service Regulations, the action of the National Aeronautics and Space Administration whereby Mrs. Mendelson was removed, effective January 6, 1963, from the position of Secretary (Typing) GS-7, on charges of having falsified her time and attendance reports and having fraudulently obtained overtime compensation.

The Board of Appeals and Review has fully considered the entire appellate record, including all representations on behalf of Mrs. Mendelson as well as the representations of the National Aeronautics and Space Administration.

The decision of the Appeals Examining Office held that the removal action was taken in compliance with the procedural requirements of Part 22 of the Civil Service Regulations. The decision also held that

the reasons given for Mrs. Mendelson's removal were substantiated by the evidence; that the agency's decision to remove was not arbitrary unreasonable, or capricious; and that the removal action was taken for such cause as would promote the efficiency of the service.

In substance, the representations in support of this further appeal are that Mrs. Mendelson's claim for 27 hours and 26 minutes of overtime to which she was not entitled were innocent mistakes; that Mrs. Mendelson put in many hours of overtime for which no claim was ever made; that insufficient consideration was given to Mrs. Mendelson's record of eleven years of government service during which time she received many commendations relative to her work performance from her superiors; and that the record evidence does not substantiate the finding of the Appeals Examining Office that the removal action was taken for such cause as would promote the efficiency of the service.

The record shows that, by letter dated December 5, 1962, the National Aeronautics and Space Agency charged Mrs. Mendelson with falsification of time and attendance reports and with fraudulently obtaining overtime compensation in the following manner:

a. During the period between January 27 and May 30, 1962, you claimed overtime work in excess of the time you were recorded as being present for duty on 11 specific occasions. The specific dates and times involved are contained in Attachment #1 to this letter. Based on the information contained in the Guard Register maintained in FOB #6, which records the times you enter and left the building on these specific occasions, it is concluded that you claimed at least 16 hours and 41 minutes of overtime work in excess of the time you were actually present for duty on those days. On each occasion, you recorded this information on the time and attendance reports (SF 1130) for the pay periods in question, and you presented these erroneous reports to your supervisor for certification, representing them to be accurate and correct in all respects.

b. On June 28, 1962, I issued a memorandum on the subject of overtime, stressing the need for reducing the amount of secretarial overtime required and emphasizing the importance of keeping a close watch on the actual usage of overtime. Both you and Mr. Carl Freedmen, your supervisor, participated in the preparation of that memorandum. You were well aware, therefore, both of my desire to control the abuse of overtime and of the necessity for control. In addition, in a signed and certified statement on file in the Inspections Division, Mr. Carl Freedmen states that several months prior to October 1962 he discussed this matter with you very explicitly and advised you of the necessity of keeping accurate time and attendance records. You admit being a party to this discussion.

c. Between June 30 and October 13, 1962, you claimed overtime in excess of the hours you are recorded as being present for duty on 10 specific occasions. The specific times and dates covering these instances are listed in Attachment #2 to this letter. Based on a review of the Guard Register maintained in FOB #6, which reflects the times you signed in and out of the building on these occasions, you claimed at least 28 hours and 45 minutes of overtime work in excess of that which you performed. For the pay periods in question, you included these excess overtime claims on time and attendance reports (SF 1130), which you then presented to your supervisor for certification, representing them to be accurate and correct in all respects.

d. During the period between May 31 and June 15, 1962, you were on leave visiting your daughter in Iowa. You returned to the office on Monday, June 18, 1962. You initially prepared your time and attendance report covering the period June 10 through June 23, 1962, reflecting that you were on leave for five work days during the week of June 10. Subsequently, however,

> you revised the time and attendance report for this period to show that you were in duty status on June 14 and 15. The revised time and attendance report was incorrect, and therefore constituted falsification.

As was pointed out in the Appeals Examining Office's decision, paragraph b. alleges no particular offense and, thus, is not in the nature of a specification. With respect to paragraphs a. and c., the record clearly shows that Mrs. Mendelson did submit erroneous time and attendance reports for the dates included in these specifications. The Board is mindful that recovery was made for overtime payment for three of the dates (i.e. September 30, October 6, and October 13, 1962) included in specification c. Nevertheless, the fact remains that Mrs. Mendelson had submitted false records of overtime for these dates and that payment had originally been tendered on the basis of the erroneous claims.

The record shows that throughout, appellant's defense has been that these claims for excessive overtime were innocent mistakes; that these claims were made at a time when there was an unusually heavy workload in the Office of Application; and that under the pressures of a heavy workload, Mrs. Mendelson neglected to keep accurate records of her overtime. This Board, after reviewing the record evidence, concurs in the finding of the Appeals Examining Office that the pattern of error is such as to lead to a reasonable conclusion that the appellant did purposefully falsify her time and attendance record and fraudulently obtain overtime compensation.

With respect to paragraph d., you contend that this specification is "nothing more or less than a 'tempest in a teapot,' because the leave which Mrs. Mendelson took was afterwards charged to her." The fact of the matter is that Mrs. Mendelson had submitted an erroneous time and attendance report showing herself in duty status on June 14 and 15, 1962, when, actually, she was on leave on those two days; subsequent action by the agency to charge Mrs. Mendelson with

annual leave for the two days in question would not negate the validity of the specification. Mrs. Mendelson's defense has been that she was recouping annual leave which she had lost at the end of leave year 1961. The Appeals Examining Office, in discussing this specification noted, in part:

> Whatever may have been the practice in other offices, the appellant's action in showing herself on active duty status while she was on leave constitutes falsification of the time and attendance record. Clearly, she was not entitled to recover any leave she may have lost in the previous year. In the absence of any clear showing that her action was authorized or approved, we must conclude that the record was deliberately falsified.

The Board of Appeals and Review agrees in that finding.

The Board has noted Mrs. Mendelson's employment record. However, it is the opinion of this Board that that record has little materiality to the pertinent issues in this appeal.

With regard to Mrs. Mendelson's appeal to the National Aeronautics and Space Administration, the record shows that the Ad Hoc Hearing Committee, convened to hear the appeal, recommended that "the action taken to dismiss her (Mrs. Mendelson) from NASA employment should be rescinded, and that in lieu of dismissal she should be suspended from duty without pay for a period not to exceed 120 days, commencing as of January 6, 1963, which was the effective date of the dismissal action." Under NASA regulations, the recommendation of such an Ad Hoc Committee is not binding upon the management official authorized to make the decision in the appeal. The record shows that Dr. Robert C. Seamans, Jr., Associate Administrator, was authorized to make the decision in Mrs. Mendelson's appeal to the agency. By letter, dated May 27, 1963, Dr. Seamans advised Mrs. Mendelson that "after a review of this report and consideration of the findings

of fact and recommendations contained therein, I have determined that the removal action should stand." The Board, after reviewing the hearing record as well as the findings and recommendations of the Ad Hoc Committee, concludes that Dr. Seamans' decision, issued on May 27, 1963, was not unreasonable, arbitrary or capricious.

In view of the foregoing and upon full review of the entire appellate record, the Board of Appeals and Review finds, as did the Appeals Examining Office, that the action of the National Aeronautics and Space Agency whereby Mrs. Mendelson was removed, effective January 6, 1963, was taken for such cause as will promote the efficiency of the service within the meaning of Part 22 of the Civil Service Regulations. Accordingly, the decision of the Appeals Examining Office, issued on August 6, 1963, is hereby affirmed.

Section 22.402(c) of the Civil Service Regularions provides that the Board's decision on appeal shall be final, and there is no further right of appeal within the Commission.

For the Commissioners:

Sincerely yours,

E. T. GROARK
Chairman, Board of Appeals
and Review

[Filed Oct. 2, 1964]

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiff respectfully moves the Court for summary judgment, and in support whereof represents as follows:

1. There is no dispute between the parties as to any material fact.

2. Plaintiff is entitled to judgment as a matter of law, the reasons for which are set out in more detail in the points and authorities in support of this motion, annexed hereto and incorporated here in by reference.

WHEREFORE, Plaintiff prays that this motion be granted.

Glenn R. Graves
Attorney for Plaintiff

[Filed Nov. 14, 1964]

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Come now defendants through their attorney, the United States Attorney, and respectfully move this Court for summary judgment in their favor on the ground that the certified copies of the administrative records concerning plaintiff, which are attached hereto and made a part hereof, disclose that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

DAVID C. ACHESON
United States Attorney

CHARLES T. DUNCAN, Principal
Assistant United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

ARNOLD T. AIKENS
Assistant United States Attorney

[Filed Oct. 2, 1964]

STATEMENT OF UNDISPUTED FACTS

As and for her statement of undisputed facts, Plaintiff designates pages 1 through 6 of the points and authorities in support of plaintiff's motion for summary judgment, annexed hereto and incorporated here in by reference.

[Filed Oct. 2, 1964]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE FACTS

The plaintiff is Mrs. Agatha Mendelson. She was formerly employed as a Secretary (GS-7) in the Office of Applications, National Aeronautics and Space Administration (hereinafter referred to as "NASA"). She was discharged from this position on January 6, 1963.

This discharge is the basis for the instant litigation.

Until the date of her separation from the Federal Service, plaintiff worked under the immediate supervision and direction of Mr. Carl Freedman, director of program review and resources management within the Office of Applications, NASA.

The adverse action against her, however, was taken by Dr. Morton J. Steller, who was at the time director of the Office of Applications, NASA. He was extremely ill during this period, and died while the plaintiff's various administrative appeals were in progress.

By a letter dated December 5, 1962, Mr. Stoller notified plaintiff of his intention to discharge her from her job.

The letter announced that plaintiff would be discharged not earlier than January 6, 1963. The reason assigned for her proposed dismissal was that "you have falsified official time and attendance reports and fraudulently obtained overtime compensation." Specifically, the letter averred that during 1962 plaintiff had turned in inaccurate time

and attendance reports, making 21 erroneous claims for overtime on various Saturdays, Sundays and holidays. The charge was grounded on discrepancies between the reports and the entries on guard registers placed in the building where plaintiff worked. The letter also charged that plaintiff had erroneously reported herself on duty status for two days in 1962 when in fact she had been on leave status. Reciting that such actions were infractions of NASA regulations, Mr. Stoller concluded that " . . . it is my decision that you will be separated from the Federal Service . . . in order to promote the efficiency of the Service."

Neither in her written reply to these charges, nor in the subsequent administrative hearings, did plaintiff contest the alleged discrepancies between the guard registers and her time and attendance reports. Rather, her position was that any reporting inaccuracies on her part were honest mistakes, resulting principally from her unusually large workload and the frenetic pace she had been obliged to maintain during the period in question.

She also emphasized that she had regularly worked overtime during the period for which she had made no claim for compensation. As to the two-day claim for leave, she candidly explained that she had done so in order to recoup leave time she had "lost" by default during the preceding working year -- following a practice that was the informal custom in her pre-NASA place of Government employment.

By a letter dated December 27, 1962 Mr. Stoller officially notified plaintiff that she would be discharged, effective January 6, 1963. In the letter he rejected the explanations offered by plaintiff in her previous reply. The letter stated, in part, that " . . . I must conclude . . . that you did violate established instructions regarding time and attendance reporting, that you falsified your overtime reports, and that you thus obtained overtime compensation fraudulently."

Thereafter, plaintiff appealed the decision within her employing agency as permitted by NASA regulations. A three-member ad hoc

committee conducted a hearing on the appeal over a four-day period, taking testimony from twelve witnesses covering 646 transcript pages, and receiving a large quantity of exhibits. NASA management adduced evidence of discrepancies, over a nine-month period in 1962, between the overtime reported by plaintiff on her time and attendance cards and certain entries on building guard registers, reflecting plaintiff's presence in the building. It also offered evidence showing that plaintiff had not recorded annual leave for two days when she was in fact on leave. Plaintiff at no time denied the aforesaid discrepancies or failure to report the two days' leave, elaborating instead an affirmative defense to the charges. She submitted evidence showing, inter alia, (a) that over the same nine-month interval as aforesaid plaintiff had worked substantial hours of overtime for which she had not made claim for compensation (b) that in failing to report the two days' leave time in 1962 she meant thereby to recoup leave time she had lost in 1961, innocently relying upon the prevailing custom in her previous places of Federal employment and a belief that her immediate NASA superior, Carl Freedman, had at least tacitly acquiesced in such a course of action (c) that she had worked well and diligently for 11 years in the Federal Service and (d) that among her superiors she enjoyed an excellent reputation for her character, devotion to duty, efficiency, enthusiasm and integrity, matters attested to by such character witnesses as Commissioner John S. Patterson of the Federal Maritime Commission, and a former NASA supervisor of the plaintiff; Dr. Morris Tepper, a NASA superior, who testified that, knowing the charges against her, he would still be willing to hire plaintiff as his own secretary; and the said Carl Freedman, plaintiff's immediate superior at the time of her discharge, who testified that he would welcome the continued services of plaintiff as his secretary.

The ad hoc committee unanimously found that the plaintiff had in fact worked a substantial number of overtime hours without claiming compensation therefor; and that, while not all of her erroneous over-

time reports were purely inadvertent, the overall pattern indicated a probable rationalization that "in the aggregate she was claiming only as much as she felt she was entitled to," as distinguished from a fraudulent motivation on her part. As to the two days' leave not reported, the committee unanimously found it credible that plaintiff did not know her action was illegal or even a serious wrongful act, and, furthermore, that she believed "she had an understanding with Mr. Freedman that this method of making up for her lost annual leave would be sanctioned by him." For these and other reasons the committee unanimously recommended that the decision to dismiss plaintiff be rescinded, and that a penalty of suspension "not to exceed 120 days" be imposed upon plaintiff. The committee filed its summary of the evidence, findings and recommendations in the form of a 70-page memorandum addressed to the defendant, Robert C. Seamans, Jr., dated May 15, 1963.

By a letter dated May 27, 1963 the defendant Robert C. Seamans, Jr., acting in the scope of his authority as agent for defendant James Webb, rejected the conclusions of the ad hoc committee. The letter was scarcely over a single page in length. In it, Mr. Seamans asserted:

> "From my review of the Committee report and the evidence contained therein, I have determined that the removal action should stand."

Mr. Seamans rendered his decision without having read the actual transcript of the hearing before the ad hoc committee and examining the numerous exhibits introduced as part of the evidence.

Although he rejected the committee's unanimous recommendation, he did not state whether he agreed or disagreed with its various findings, nor did he assign any specific reasons for overruling their recommendations other than that "the submission of false time and attendance reports" constituted a "serious offense against good morale and discipline."

Plaintiff then perfected her administrative appeal through the United States Civil Service Commission.

A hearing was held before an Appeals Examining Officer, though the evidence adduced was far less extensive than in the voluminous record compiled before the ad hoc committee. The NASA management, in fact, offered no witnesses at all, resting its case entirely upon the evidence previously presented.

On August 6, 1963 the Appeals Examining Office of the Commission issued a recommendation that the action of Mr. Seamans not be disturbed. In its findings, the Office recognized that "the reason given for the Appellant's removal consists of two parts; (1) that she falsified time and attendance records and (2) fraudulently obtained overtime compensation. It seems clear that the intent was to charge, . . . that the appellant deliberately and purposefully falsified the records to secure compensation to which she was not entitled."

The opinion of the Appeals Examining Office heavily discounted the testimony concerning plaintiff's long and faithful Government service, and her good character.

As to plaintiff's explanation of some of her inaccurate overtime claims on the ground of the inordinate work demands made upon her, the opinion simply stated " . . . we cannot conclude that this activity in the office and the demands placed on the appellant represent a valid explanation of her failure to maintain and submit accurate and truthful records of her own overtime."

In response to plaintiff's contention that she had worked substantial overtime for which she made no claim for compensation, the opinion conceded that this may have been so, but "[a]ssuming that there may have been days when she worked more hours than she reported, this would not necessarily indicate that her excessive claims on weekends were honest error. A more logical conclusion would be that excessive claims were deliberately made to offset the unclaimed overtime."

With respect to the charge based on the erroneous claim for active duty status on two leave days, the opinion conceded that plaintiff may have misunderstood "something . . . said" by her immediate superior,

Mr. Carl Freedman, and thus thought she could permissibly have recouped leave time "lost" at the close of the previous year. Nor did it dispute the uncontradicted testimony that this had indeed been the prevailing practice where plaintiff had worked before joining NASA. Nevertheless, it concluded that "In the absence of any clear showing that her action was authorized or approved, we must conclude that the record was deliberately falsified."

The Commission's opinion contained no explicit finding as to:

(a) whether any of the inaccurate reports were the result of inadvertence or honest mistakes, and if so, how many.

(b) whether any of the inaccurate reports were the result of an honest, albeit mistaken assumption by plaintiff that she could properly claim compensation for overtime previously worked and not theretofore claimed.

(c) whether the inaccurate leave report for two days was made on the strength of a bona-fide and innocent belief that she could thereby recover leave time lost of the close of the preceding work year.

Plaintiff then appealed the decision to the Board of Appeals and Review of the Commission. By a letter of November 8, 1963 the Board affirmed the previous decision of the Appeals Examining Office in all particulars.

* * *

STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h)

1. This is a civil service employee discharge case. Plaintiff was employed as a secretary, GS-7, in the Office of Applications, Program Review and Resources Management, National Aeronautics and Space Administration.

2. By letter dated December 5, 1962, plaintiff was notified by the Director, Office of Applications, National Aeronautics and Space Administration, that the agency proposed to remove her from her position.

3. Plaintiff was charged inter alia with the following specific actions:

a. During the period between January 27 and May 30, 1962, you claimed overtime work in excess of the time you were recorded as being present for duty on 11 specific occasions. The specific dates and times involved are contained in Attachment #1 to this letter. Based on the information contained in the Guard Register maintained in FOB #6, which records the times you entered and left the building on these specific occasions, it is concluded that you claimed at least 16 hours and 41 minutes of overtime work in excess of the time you were actually present for duty on those days. On each occasion, you recorded this information on the time and attendance reports (SF 1130) for the pay periods in question, and you presented these erroneous reports to your supervisor for certification, representing them to be accurate and correct in all respects.

* * *

"c. Between June 30 and October 13, 1962, you claimed overtime in excess of the hours you are recorded as being present for duty on 10 specific occasions. The specific times and dates covering these instances are listed in Attachment # 2 to this letter. Based on a review of the Guard Register maintained in FOB #6, which reflects the times you signed in and out of the building on these occasions, you claimed at least 28 hours and 45 minutes of overtime work in excess of that which you performed. For the pay periods in question, you included these excess overtime claims on time and attendance reports (SF 1130), which you then presented to your supervisor for certification, representing them to be accurate and correct in all respects.

"d. During the period between May 31 and June 15, 1962, you were on leave visiting your daughter in Iowa. You

> returned to the office on Monday, June 18, 1962. You initially prepared your time and attendance report covering the period June 10 through June 23, 1962, reflecting that you were on leave for five work days during the week of June 10. Subsequently, however, you revised the time and attendance report for this period to show that you were in duty status on June 14 and 15. The revised time and attendance report was incorrect, and therefore constituted falsification." (Exhibit D-1).

4. Plaintiff replied to the charges by submitting representations in letter form on December 11, 1962. She also requested a reconsideration of the proposed removal.

5. Plaintiff's request for reconsideration was denied. She thereafter appealed the decision within the employing agency.

6. On January 8, 1963, an ad hoc hearing committee was appointed pursuant to regulations set forth in the National Aeronautics and Space Administration Management Manual, Chapter 17. The hearing commenced on March 6, 1963 and consumed four days. Plaintiff was represented by counsel and was afforded full opportunity of cross-examination and to present evidence on her own behalf. The transcript of the hearing contains some 677 pages.

7. At the conclusion of the hearing, the ad hoc committee submitted a 70-page report to Dr. Robert C. Seamans, Jr., the Associate Administrator of NASA containing a review of the evidence and the Committee's recommendations.

8. Of the charges, the report says: "The committee finds that the weight of the evidence indicates that the 21 excess overtime claims, taken as a whole, were not the result of honest errors or mistakes as contended by Mrs. Mendelson, even though it may be conceded that one or more may have been." (Exhibit E, p. 140)

While the committee found that the excess overtime claims were deliberately made, it found "at least a reasonable doubt" that they were not done with a fraudulent intent.

Of charge (d), the committee found that plaintiff did not charge herself for the two days of annual leave taken. It further found that she "probably did not have an intent to make a fraudulent claim in this situation * * *."

The report states: " * * * the committee feels that Mrs. Mendelson deserves to receive a substantial penalty for her actions, but that it should be less than dismissal." (Exhibit E, p. 153) The committee therefore recommended that she be suspended from duty without pay for a period not to exceed 120 days. The report further states:

> "On the other hand, in concluding that the action taken to dismiss Mrs. Mendelson from NASA employment should be rescinded, the Committee has not lost sight of the fact that Mrs. Mendelson committed a number of very serious violations, which cannot be condoned, and should not be excused. Mrs. Mendelson's practices in connection with filing her overtime reports displayed at least flagrant carelessness, inefficiency, poor judgment, and a disregard for following good office procedures and methods. By virtue of her long Government experience, her high civil-service grade, and her reputation for being a well-trained and reliable secretary, Mrs. Mendelson should not have been guilty of these things. Similarly, her failure to charge herself for two days of annual leave was a serious breach of conduct, notwithstanding any similar practices which may be followed in other Government agencies, so long as she lacked a clear and explicit authorization from Mr. Freedman that she would be permitted to do this." (Exhibit E, pp. 152-53)

9. By letter dated May 27, 1963, Robert C. Seamans, Jr., Associate Administrator of NASA upheld the determination to remove plaintiff from her position stating:

> "From my review of the Committee report and the evidence contained therein, I have concluded that the submission of false time and attendance reports by you

> constituted the kind of dereliction of duty that is a serious offense against good morale and discipline. In light of the nature of this offense, I find that, despite the factors that led the Committee to recommend that your punishment be mitigated, your removal will promote the efficiency of the Federal service." (Exhibit E-1)

10. On June 7, 1963, plaintiff appealed to the Civil Service Commission. She was accorded a hearing and was represented by counsel. The Appeals Examining Office in its opinion of August 6, 1963 found:

> "that the pattern of error is such as to lead to a reasonable conclusion that the appellant did purposefully falsify her time and attendance record and fradulently obtain overtime compensation." (Exhibit H-1)

And further:

> "Whatever may have been the practice in other offices, the appellant's action in showing herself on active duty status while she was on leave constitutes falsification of the time and attendance record." (Exhibit H-1)

The opinion concludes:

> "On review of all the record, we find that the reasons given for the appellant's removal are substantiated by the evidence, that the agency's decision to remove was not arbitrary, unreasonable, or capricious and that the removal was an action taken for such cause as will promote the efficiency of the service." (Exhibit H-1)

11. Plaintiff appealed to the Board of Appeals and Review of the Civil Service Commission. In its decision of November 8, 1963, it stated:

> "The Board, after reviewing the hearing record as well as the findings and recommendations of the Ad Hoc Committee, concludes that Dr. Seamans' decision, issued on May 27, 1963, was not unreasonable, arbitrary or capricious." (Exhibit O)

" * * * Upon full review of the entire appellate record", the Board of Appeals and Review affirmed the decision of the Appeals Examining Office.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO RULE 9(h)

Come now defendants by their attorney, the United States Attorney, in opposition to plaintiff's statement of material facts pursuant to Local Rule 9(h).

In order to avoid the possibility of this Court assuming, pursuant to the third paragraph of Local Rule 9(h), that defendants agree plaintiff's statement of facts contains material facts, the Court is respectfully informed as follows:

1. That this case presents solely a question of law for determination by the Court, on judicial review of the Civil Service Commission decision and supporting Civil Service Commission administrative record.

2. That the claimed "fact" contained in paragraph 3, page 4, is immaterial.

3. That the quotation in paragraph 2, page 4, is an erroneous quotation.

4. That counsel's interpretations and characterizations of the agency's ruling (paragraph 4, page 4) and the Commission's ruling (paragraph 1, page 5) are improperly included as a statement of fact.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Arnold T. Aikens
Assistant United States Attorney

[Certificate of Service]

[Filed Jan. 19, 1965]

ORDER

This cause having come before the Court on plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment, and it appearing to the Court that there is no genuine issue of material fact involved herein and that defendants are entitled to judgment as a matter of law, it is by the Court this 19th day of January, 1965,

ORDERED that defendants' cross-motion for summary judgment be and it hereby is granted, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and it hereby is denied.

/s/ William B. Jones
United States District Judge

[Filed Mar. 8, 1965]

NOTICE OF APPEAL

Notice is hereby given this 8th day of March, 1965, that Agatha Mendelson hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of January, 1965 in favor of defendants John Macy, James Webb and Robert C. Seamans, Jr. against said Agatha Mendelson.

Glenn R. Graves
Attorney for
Agatha Mendelson

PART II

MANAGEMENT MANUAL

ADMINISTRATIVE REGULATIONS AND PROCEDURES

CHAPTER 17

NUMBER 17-7-30 (CSC 752)

EFFECTIVE DATE July 1, 1962

SUBJECT: NASA APPEALS SYSTEM

1. PURPOSE

The purpose of this Instruction is to establish the policies, regulations and procedures concerning appeals from certain adverse actions.

2. APPLICABILITY

This Instruction applies to NASA Headquarters and field installations.

3. AUTHORITY

a. 5 U.S.C. 652.

b. 5 U.S.C. 863.

c. Executive Order 10987.

d. Federal Personnel Manual, Chapter 21, Parts 9, 22 and 77.

4. DEFINITIONS

For purposes of this Instruction, the following definitions will apply:

a. Adverse action means suspension for more than 30 calendar days, furlough without pay, reduction in rank or compensation, involuntary separation, or removal.

b. Appeal means a written request by an employee for reconsideration of an adverse decision.

c. Employee means a person employed by NASA and a former employee of NASA unless otherwise specified.

d. Furlough without pay means a temporary nonpay status and absence from duty required because of lack of work or funds or other curtailment of activities for a period of 30 calendar days or less. Temporary nonpay status exceeding 30 calendar days is governed by reduction-in-force appeals procedures.

e. Reduction in rank means a lowering of an employee's relative standing in the organizational alignment, as determined by his official position assignment. A reduction in rank occurs only when the employee is the subject of a personnel action.

f. Reemployed annuitant means an employee whose annuity under the Civil Service Retirement Act was continued upon reemployment in an appointive position on or after October 1, 1956.

5. POLICY

a. Prompt reconsideration will be given to protested administrative decisions to take adverse actions against employees.

b. Management officials will ensure the utilization of all safeguards to protect employees against arbitrary or unjust adverse actions.

6. INCLUSIONS

a. Adverse Actions Covered. The appeals procedures covered in this Instruction are limited to appeals for the following types of adverse actions which are initiated on or after July 1, 1962:

(1) Removal,

(2) Involuntary separation,

(3) Suspension for more than 30 calendar days,

(4) Furlough without pay, and

(5) Reduction in rank or compensation including reductions in rank or compensation which are taken, at the election of NASA, after a position classification decision by NASA or the Civil Service Commission.

b. Employees Covered. The appeals procedures covered by this Instruction are applicable to:

(1) Any career, career-conditional, overseas limited, or indefinite employee who is not serving a probationary or trial period in a position in the competitive service;

(2) Any employee having a competitive status who occupies a position in Schedule B under a nontemporary appointment; and

(3) Any employee entitled to veteran's preference under 5 U.S.C. 652 who has completed one year of current continuous employment in a position outside the competitive service.

7. EXCLUSIONS

a. Adverse Actions Not Covered. This Instruction does not apply to the following adverse actions:

(1) Decisions of the Civil Service Commission.

(2) Actions taken by NASA pursuant to instructions from the Civil Service Commission.

(3) Actions taken under 5 U.S.C. 22-1 and any other statute which authorizes NASA to take suspension or separation action without regard to 5 U.S.C. 652, or the provisions of any other law.

(4) Actions governed by the provisions of Executive Order 10925 and the regulations of the President's Committee on Equal Employment Opportunity in which the employee alleges discrimination in whole or in part on race, creed, color, or national origin.

b. Employees Not Covered. This Instruction does not apply to the following employees except as specified in paragraph 6b:

(1) A reemployed annuitant.

(2) An employee occupying a position in the competitive service under a temporary appointment.

(3) An employee currently serving a probationary or trial period.

(4) An employee in a position outside the competitive service.

(5) An employee who is a member of a class of employees excluded from coverage by the Civil Service Commission on the recommendation of the Administrator or his designated representative.

8. NOTICES OF APPEAL RIGHTS

a. Notice of Adverse Decision. The notice of adverse decision issued in accordance with the provisions of paragraph 8, NASA Management Instruction 17-7-24, must advise the employee of his right to appeal the decision to NASA and the Civil Service Commission, of the order of processing of his appeal(s), of time limits for filing the appeal(s), and where he may obtain information on how to pursue the appeal(s). In addition, the notice must advise him of his right to a formal hearing if such a

hearing was not held prior to the decision. Under Executive Order 10987, he will have the right to appeal this adverse action to the (Director of the Field installation for field employees; or Associate Administrator for NASA Headquarters employees, as appropriate), at any time after the date of this notice but not later than 10 calendar days after the effective date of the adverse action. He also has the right to appeal an adverse action to the appropriate office of the Civil Service Commission.

(1) If he elects to appeal to NASA, he will be entitled to appeal to the Civil Service Commission within 10 calendar days after the receipt of the notice of appellate decision on his appeal to NASA, and

(2) If he elects to appeal to the Civil Service Commission within 10 calendar days after the effective date of the adverse action, he will forfeit his right of appeal to NASA.

(3) If he exercised his right to a formal hearing in NASA prior to the adverse decision, he may not be granted a hearing at this time.

(4) If he did not exercise his right to a formal hearing in NASA prior to the adverse decision, he may be granted a hearing at this time.

(5) The employee will also be advised that he may obtain information about the appeals procedures and related matters from the local personnel office.

b. Exceptions. An employee entitled to preference under 5 U.S.C. 652 who has completed one year of current continuous employment in a position outside the competitive service is not covered under the provisions of Executive Order 10987. Therefore, the following exceptions apply to the employee:

(1) Such an employee has a right to appeal an adverse action to the appropriate office of the Civil Service Commission within 10 calendar days after the effective date of the action.

(2) If such employee prefers, in lieu of appealing to the Civil Service Commission, he may appeal to the Director of the field installation for field employees, or to the Associate Administrator for Headquarters employees, within 10 calendar days after the effective date of the adverse action.

(3) Concurrent appeals to NASA and the Civil Service Commission may not be made. Therefore, if the employee appeals to the Civil Service Commission, any appeal which may have been made within NASA will be canceled.

9. PROCESSING OF APPEALS

a. Request for an Appeal. An employee will submit his appeal to the official specified in the notice of adverse decision. The appeal will be in memorandum form and shall clearly set forth the basis for the appeal (reply to the charges) and will include his request for a hearing if desired.

b. Avoidance of Delay. Both management officials and employees are expected to process promptly their respective parts of an appeal in order to prevent unreasonable delays.

c. Employee's Appeal File. Upon receipt of an employee's appeal, an employee's appeal file will be established by the installation personnel office. This file will contain all pertinent documents relating to the appeal, including but not limited to:

(1) Notice of proposed adverse action.

(2) Employee's reply, if any.

(3) Notice of adverse decision.

(4) Employee's appeal.

(5) Reasons for not granting a hearing when one was requested but not granted.

(6) Written summary or transcript of the hearing (if held), including tape recording (if used).

(7) Report of the Hearing Committee, if a hearing was held.

(8) Notice of appellate decision.

d. Hearings. If an appeal hearing is held, such hearing will be conducted in accordance with paragraphs 10 and 11. A record of each hearing will be made in accordance with the instructions set forth in paragraph 11.

e. Scope of Appellate Review. The review of an appeal will include but shall not be limited to a review of issues of fact and of compliance with NASA and Civil Service Commission procedural requirements for effecting the adverse action. The responsible management official will ensure

that a full, impartial and expeditious consideration is made of the entire appellate record. After such consideration, the management official will determine either to:

(1) Sustain the previous decision to take adverse action, or

(2) Modify the previous decision by substituting a less severe action, or

(3) Reverse the previous decision.

f. Notice of Appellate Decision

(1) When an employee has been accorded a hearing, the notice of appellate decision will be rendered within 5 working days after receipt of the Hearing Committee's report.

(2) If a hearing was not conducted, the notice of appellate decision will be rendered within 10 calendar days after receipt of the employee's appeal.

(3) The notice will advise the employee that he may appeal to the Civil Service Commission within 10 calendar days after receipt of this notice.

g. Reopening of an Appeal. Upon a request and showing by the employee that circumstances beyond his control prevented him from prosecuting his appeal, the responsible management official may determine whether the closed appeal should be reopened.

h. Termination of an Appeal. An employee's appeal may be terminated under any of the following circumstances:

(1) At the employee's request, with or without reason.

(2) When the employee fails to prosecute by not furnishing required information or by not duly proceeding with the advancement of his appeal. However, in lieu of terminating the appeal for failure to prosecute, the appeal may be adjudicated by NASA if the information is sufficient for that purpose.

(3) When the employee files an appeal to the Civil Service Commission from the same adverse decision and the Commission accepts the appeal for adjudication.

(4) If an employee's appeal to NASA is not completed within 60 calendar days after filing, the employee may elect to terminate such appeal to NASA by appealing to the Civil Service Commission.

i. Death of Employee. A proper appeal filed by an employee prior to his death will be processed to completion and adjudication. A recommendation sustaining such an appeal may provide for cancellation of the adverse action and for amendment of the appropriate records to show, for those cases involving removal, suspension, or furlough without pay, retroactive restoration and continuance on the rolls of the employee to the date of his death.

10. HEARING PANELS AND COMMITTEES

a. Selection. The Director of each NASA installation and the Director of Administration, NASA Headquarters, will:

(1) Establish a local Hearing Panel consisting of 15 members, and/or

(2) Appoint an ad hoc Hearing Committee, consisting of 3 members, for each appeal case.

The establishment of a local Hearing Panel will provide a means by which the Director will have available a ready source from which to appoint ad hoc Hearing Committee members and the local Grievance Review Officer. It will also provide the opportunity for training persons in the techniques of conducting hearings and for familiarizing them with the processes of adjudicating appeals. The installation personnel officer should be concerned with the training, familiarization, and indoctrination of panel members.

b. Hearing Panels. When a Hearing Panel is established, the members will be selected as follows:

(1) Five members should be persons at or above the level of division chief.

(2) Five members should be supervisory employees.

(3) Five members should be nonsupervisory employees.

In addition, in order to provide the necessary flexibility for compliance with the requirements of a Hearing Committee, not more than one person should be selected from each organizational line of authority within each of the three groups of members.

c. Hearing Committees

(1) When a hearing is held, it shall be conducted by an ad hoc Hearing Committee. This committee shall be selected within two working days after receipt of the employee's request for a hearing by the responsible official.

(2) When a Hearing Panel has been established, the Hearing Committee will be composed of one member selected from each group of the local Hearing Panel. The person selected from the division chief or higher group will serve as Chairman.

(3) When a Hearing Panel has not been established, the Hearing Committee members will be appointed in accordance with the criteria in subparagraph (2).

(4) Each member of the Hearing Committee shall have equal voting rights in preparing the Committee's report.

(5) In order that persons selected to serve as members of an ad hoc Hearing Committee will be uninhibited in performing their responsibility to be fair, impartial and objective, such persons may not be:

(a) From the same organizational line of authority:

(i) As the employee whose appeal is being considered.
(ii) As the management official who proposed or effected the adverse decision being appealed.
(iii) As another member of the Hearing Committee.

(b) A member of the installation personnel office, including the clerical staff.

(c) A person who was or is otherwise responsible for reviewing or acting on the proposal to take adverse action, on the adverse decision, or on the report of the Hearing Committee.

The above standards also apply to local Grievance Review Officer.

11. HEARING PROCEDURES

a. General

(1) Hearings will be conducted solely for the purpose of obtaining facts relating to adverse actions and grievances on which an equitable decision may be based and to give the employee an opportunity to present his side of the case. Hearings are purely administrative proceedings; they are not courts nor are they governed by the legal rules of procedure and evidence. However, they shall be conducted in an orderly manner. (The term "ad hoc Hearing Committee" will be construed to mean "local Grievance Review Officer" for grievance hearings.)

(2) All persons concerned, including management officials, the employee and his representative, must assume responsibility for conforming to appropriate standards of personal conduct or incur the risk of disciplinary action. The employee concerned must assume responsibility for the deportment and assertions of his representative when such representative is not a NASA employee.

(3) The practice of restraint, interference, coercion, discrimination, or reprisal action against an employee or his representative on the part of any management official, supervisor, employee organization, or employee in connection with the processing of an adverse action and its appeal will be sufficient cause to take disciplinary action against such person using such practices.

(4) The hearing will be held whenever practicable near the employee's locality of work and will be so conducted as to bring out pertinent facts, including the producing of pertinent records (see subparagraph e).

b. Employee Representative. An employee may be accompanied and represented at a hearing by any one person of his choice. Any such representative may identify himself as being connected with a specific employee organization.

c. Management Representative. Management will be represented at all appeal hearings by a principal representative and/or his assistant. Normally, these representatives will be persons in the organizational line of authority over the employee whose appeal is being considered. These representatives will remain throughout the hearing.

d. Witnesses

(1) The employee and the management representative may request the Hearing Committee to call witnesses who have direct knowledge of circumstances and factors bearing on the case. Witnesses may be limited by the hearing committee on the basis of fair standards which shall be explained and made a part of the hearing record. No more than one witness may be present at the hearing at one time. Witnesses shall be assured that no reprisal action will be taken against them for testifying at the hearing.

(2) Employees of the NASA installation concerned will be required to attend hearings as witnesses if their presence is requested by the Hearing Committee after consideration of requests by the appellant or management representative. Such employees will be considered to be in a duty status during this time and will not be charged annual leave.

(3) When the Director of the field installation or the Director of Administration for NASA Headquarters determines that it is impractical to comply with the requests of the Hearing Committee for particular witnesses, the reasons for the declination shall become a part of the hearing record.

e. Conduct of Hearing. The following standards and procedures will be observed in conducting hearings:

(1) The employee and the management representative will be advised of the purpose of the hearing and of their right to call witnesses. In addition, the employee will be advised of his right to representation.

(2) The proceedings will begin with the management representative presenting the case against the employee. This presentation will include a statement of the charges and the evidence in support of the charges. The evidence may be in the form of testimony of witnesses and participants and introduction of pertinent documents, materials and equipment. Where necessary, affidavits or depositions may be used, with the employee being allowed a reasonable time in which to obtain counter affidavits or depositions. Management may not rely on information of a confidential nature which may be made available to the Hearing Committee or the official who will decide

the case, but which may not be made available to the employee or his representative. Therefore, information of a confidential nature must be developed in an unclassified form before it may be presented as evidence against the employee.

(3) The employee will be given full opportunity to reply to and refute the evidence and charges against him and to present evidence in his own behalf. Evidence may be in the form of testimony of witnesses and participants and introduction of pertinent documents, materials and equipment. Where necessary, affidavits or depositions may be used with the management representative being allowed a reasonable time in which to obtain counter affidavits or depositions.

(4) Witnesses will be under oath or affirmation, called individually, advised of the purpose of the hearing, cautioned to remain as factual as possible in their testimony, and advised that their testimony should not be discussed outside the hearing. Both the employee and the management representative will have the right to cross-examine each witness. *The Chairman of the Hearing Committee (local Grievance Review Officer in grievance hearings) is hereby delegated authority to administer oaths or affirmations to witnesses.*

(5) The Hearing Committee will make every effort to:

(a) Elicit all of the facts bearing on the case whether those facts support the charges or support the employee's position;

(b) Confront the employee with the witnesses against him if that is the employee's desire;

(c) Assure the employee's full understanding of all phases of the matter; and

(d) Confine the discussion and testimony to issues directly related to the case.

(6) The installation personnel officer or his designated representative will serve as recorder for the hearing and as advisor on matters of personnel policy and procedure.

(7) Hearings should be conducted as expeditiously as possible and normally should not exceed one working day.

g. Record of the Hearing

(1) An official record of the hearing shall be made, including either a verbatum transcript of the testimony or a summary of the proceedings. The record will include the name and title of the member or members of the committee and all other persons participating in the hearing.

(2) Although a transcript is not required, mechanical recording equipment (tape recorders) will be used where possible since it may provide a more accurate record and preserve the atmosphere of the hearing.

(3) The employee and the management representative will be given copies of the transcript or summary and an opportunity to hear the tape recording. They may, after reviewing the transcript or summary or listening to the mechanical recording of the hearing, submit correction to the transcript or summary in a separate statement, designating pages and lines which are questioned. The mechanical recording of the hearing will be retained by the installation until the employee has exhausted all appeal rights he may have within and outside NASA.

h. Report of Hearing. Within 5 working days after completion of the hearing, the Committee will report, in writing, its findings of fact and recommendations to:

(1) The management official authorized to made the decision on the adverse action when the hearing is held before the original adverse decision, or

(2) The management official authorized to make the decision on the appeal when the hearing is held after the original adverse decision.

A copy of the Committee's report will be furnished to the employee and his representative.

12. RESPONSIBILITY FOR DISSEMINATION

Each NASA Installation personnel officer is responsible for providing copies of this Instruction to employees (and their representatives) who have had adverse actions initiated against them and for which they have appeal rights.

A. S. Hodgson

Albert F. Siepert
Director of Administration

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,310

AGATHA MENDELSON,

Appellant

v.

JOHN W. MACY, JR.
Chairman, U.S. Civil Service Commission

JAMES WEBB,
Administrator, National Aeronautics and Space Administration

ROBERT C. SEAMANS, JR.,
Associated Administrator, National Aeronautics
and Space Administration,

Appellees

Appeal From the United States District Court
For the District of Columbia

GLENN R. GRAVES
625 Washington Building
Washington, D. C.

Attorney for Appellant

QUESTIONS PRESENTED

1. Was the administrative review of appellant's dismissal from her Federal employment procedurally defective, either as a matter of administrative law or due process, because (1) the official required by the employing agency's regulations to make a review based on the "entire appellate record" did not examine or cause to be examined any of the evidence in the appellate record and (2) rejected the unanimous recommendation of the *ad hoc* committee, before which such evidence had been adduced, that the appellant not be dismissed?

2. Was the administrative review of appellant's dismissal from her Federal employment procedurally defective in that the findings of the Civil Service Commission were ambiguous and inadequate?

3. Was the inference of fraud drawn by the employing agency and the Civil Service Commission, in connection with the administrative review of appellant's dismissal from her Federal employment, arbitrary, capricious and unreasonable?

INDEX

TABLE OF AUTHORITIES

Cases:

Other Citations:

* Cases chiefly relied on.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,310

AGATHA MENDELSON,

Appellant

v.

JOHN W. MACY, JR.
Chairman, U.S. Civil Service Commission

JAMES WEBB,
Administrator, National Aeronautics and Space Administration

ROBERT C. SEAMANS, JR.,
Associated Administrator, National Aeronautics
and Space Administration,

Appellees

Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdictional basis for the complaint, as alleged, was 28 U.S.C. §§1331, 2201 and 2202 (1958 ed.). The cause of action asserted was that the appellant had been unlawfully separated from her employment in the National Aeronautics and Space Administration by the col-

lective action of the appellees. The theory asserted was that the appellant had been denied certain procedural rights in the administrative review of her dismissal, and that the charge that she was culpable of "fraud" had not been supported by the evidence. The relief prayed for was a declaratory judgment that appellant's discharge was wrongful and that she was entitled to reinstatement. On January 19, 1965 an order was entered granting appellees' motion for summary judgment and denying a motion for summary judgment made by appellant (JA 92). The notice of appeal was filed on March 8, 1965. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The appellant is Mrs. Agatha Mendelson. She was formerly employed as a Secretary (GS-7) in the Office of Applications, National Aeronautics and Space Administration (hereinafter referred to as "NASA"). She was discharged from this position on January 6, 1963.

This discharge is the basis for the instant litigation.

Until the date of her separation from the Federal Service, appellant worked under the immediate supervision and direction of Mr. Carl Freedman, director of program review and resources management within the Office of Applications, NASA.

The adverse action against her, however, was taken by Dr. Morton J. Stoller, who was at the time director of the Office of Applications, NASA. He was extremely ill during this period, and died while the appellant's various administrative appeals were in progress.

By a letter dated December 5, 1962, Mr. Stoller notified appellant of his intention to discharge her from her job. (JA 51)

The letter announced that appellant would be discharged not earlier than January 6, 1963. The reason assigned for her proposed dis-

missal was that "you have falsified official time and attendance reports and fraudulently obtained overtime compensation." (JA 51) Specifically, the letter averred that during 1962 appellant had turned in inaccurate time and attendance reports, making 21 erroneous claims for overtime on various Saturdays, Sundays and holidays. The charge was grounded on discrepancies between the reports and the entries on guard registers placed in the building where appellant worked. The letter also charged that appellant had erroneously reported herself on duty status for two days in 1962 when in fact she had been on leave status. Reciting that such actions were infractions of NASA regulations, Mr. Stoller concluded that ". . . it it my decision that you will be separated from the Federal Service . . . in order to promote the efficiency of the Service." (JA 58)

Neither in her written reply to these charges, nor in the subsequent administrative hearings, did appellant contest the alleged discrepancies between the guard registers and her time and attendance reports. Rather, her position was that any reporting inaccuracies on her part were honest mistakes, resulting principally from her unusually large workload and the frenetic pace she had been obliged to maintain during the period in questions. (JA 12, 22)

She also emphasized that she had regularly worked overtime during the period for which she had made no claim for compensation. As to the two-day claim for leave, she candidly explained that she had done so in order to recoup leave time she had "lost" by default during the preceding working year — following a practice that was the informal custom in her pre-NASA place of Government employment.

By a letter dated December 27, 1962, Mr. Stoller officially notified appellant that she would be discharged, effective January 6, 1963. In the letter he rejected the explanations offered by appellant in her previous reply. The letter stated, in part, that ". . . I must conclude . . . that you did violate established instructions regarding time and

attendance reporting, that you falsified your overtime reports, and that you thus obtained overtime compensation fraudulently." (JA 58)

Thereafter, appellant appealed the decision within her employing agency as permitted by NASA regulations. A three-member ad hoc committee, composed of NASA officials outside appellant's chain of command, conducted a hearing on the appeal over a four-day period, taking testimony from twelve witnesses covering 646 transcript pages, and receiving a large quantity of exhibits. (JA 8-50) NASA management adduced evidence of discrepancies, over a nine-month period in 1962, between the overtime reported by plaintiff on her time and attendance cards and certain entries on building guard registers, reflecting appellant's presence in the building. It also offered evidence showing that appellant had not recorded annual leave for two days when she was in fact on leave. Appellant at no time denied the discrepancies or failure to report the two days' leave, elaborating instead an affirmative defense to the charges. (JA 12, 22, 26, 36) She submitted evidence showing, *inter alia*, (a) that over the same nine-month interval appellant had worked substantial hours of overtime for which she had not made claim for compensation, (b) that in failing to report the two days' leave time in 1962 she meant thereby to recoup leave time she had lost in 1961, innocently relying upon the prevailing custom in her previous places of Federal employment and a belief that her immediate NASA superior, Carl Freedman, had at least tacitly acquiesced in such a course of action (c) that she had worked well and diligently for 11 years in the Federal Service and (d) that among her superiors she enjoyed an excellent reputation for her character, devotion to duty, efficiency, enthusiasm and integrity, matters attested to by such character witnesses as Commissioner John S. Patterson of the Federal Maritime Commission, and a former NASA supervisor of the plaintiff; Dr. Morris Tepper, a NASA superior, who testified that, knowing the charges against her, he would still be willing to hire appellant as his own secretary; and the said Carl Freedman, appellant's

immediate superior at the time of her discharge, who testified that he would welcome the continued services of appellant as his secretary. (JA 26, 31, 36, 38-41)

The *ad hoc* committee unanimously found that the appellant had in fact worked a substantial number of overtime hours without claiming compensation therefor; and that, while not all of her erroneous overtime reports were purely inadvertent, the overall pattern indicated a probable rationalization that "in the aggregate she was claiming only as much as she felt she was entitled to," as distinguished from a fraudulent motivation on her part. (JA 47) As to the two days' leave not reported, the committee unanimously found it credible that appellant did not know her action was illegal or even a serious wrongful act, and, furthermore, that she believed "she had an understanding with Mr. Freedman that this method of making up for her lost annual leave would be sanctioned by him." (JA 48) For these and other reasons the committee unanimously recommended that the decision to dismiss appellant be rescinded, and that a penalty of suspension "not to exceed 120 days" be imposed upon appellant. (JA 50) The committee filed its summary of the evidence, findings and recommendations in the form of a 70-page memorandum addressed to the defendant, Robert C. Seamans, Jr., dated May 15, 1963.

By a letter dated May 27, 1963, the appellee Robert C. Seamans, Jr., acting in the scope of his authority as agent for appellee James Webb, rejected the conclusions of the *ad hoc* committee. The letter was scarcely over a single page in length. In it, Mr. Seamans asserted:

> "From my review of the Committee report and the evidence contained therein, I have determined that the removal action should stand." (JA 61)

Mr. Seamans rendered his decision without having read the actual transcript of the hearing before the *ad hoc* committee and examining the numerous exhibits introduced as part of the evidence. Nor had he caused this to be done by others. (R. CSC Tr. 86, JA 61)

Although he rejected the committee's unanimous recommendation, he did not state whether he agreed or disagreed with its various findings, nor did he assign any specific reasons for overruling their recommendations other than that "the submission of false time and attendance reports" constituted a "serious offense against good morale and discipline."

Appellant then perfected her administrative appeal through the United States Civil Service Commission.

A hearing was held before an Appeals Examining Officer, though the evidence adduced was far less extensive than in the voluminous record compiled before the *ad hoc* committee. The NASA management, in fact, offered no witnesses at all, resting its case entirely upon the evidence previously presented.

On August 6, 1963, the Appeals Examining Office of the Commission issued a recommendation that the action of Mr. Seamans not be disturbed. In its findings, the Office recognized that "the reason given for the appellant's removal consists of two parts; (1) that she falsified time and attendance records and (2) fraudulently obtained overtime compensation. It seems clear that the intent was to charge, . . . that the appellant deliberately and purposefully falsified the records to secure compensation to which she was not entitled." (JA 68)

The opinion of the Appeals Examining Office heavily discounted the testimony concerning appellant's long and faithful Government service, and her good character. (JA 71)

As to appellant's explanation of some of her inaccurate overtime claims on the ground of the inordinate work demands made upon her, the opinion simply stated ". . . we cannot conclude that this activity in the office and the demands placed on the appellant represent a valid explanation of her failure to maintain and submit accurate and truthful records of her own overtime." (JA 71)

In response to appellant's contention that she had worked substantial overtime for which she made no claim for compensation, the opinion conceded that this may have been so, but "[a]ssuming that there may have been days when she worked more hours than she reported, this would not necessarily indicate that her excessive claims on weekends were honest errors. A more logical conclusion would be that excessive claims were deliberately made to offset the unclaimed overtime." (JA 71-72)

With respect to the charge based on the erroneous claim for active duty status on two leave days, the opinion conceded that appellant may have misunderstood "something . . . said" by her immediate superior, Mr. Carl Freedman, and thus thought she could permissbly have recouped leave time "lost" at the close of the previous year. Nor did it dispute the uncontradicted testimony that this had indeed been the prevailing practice where appellant had worked before joining NASA. Nevertheless, it concluded that "In the absence of any clear showing that her action was authorized or approved, we must conclude that the record was deliberately falisified." (JA 73)

The Commission's opinion contained no explicit finding as to:

(a) whether any of the inaccurate reports were the result of inadvertence or honest mistakes, and if so, how many;

(b) whether any of the inaccurate reports were the result of an honest, albeit mistaken assumption by appellant that she could properly claim compensation for overtime previously worked and not theretofore claimed;

(c) whether the inaccurate leave report for two days was made on the strength of a bona-fide and innocent belief that she could thereby recover leave time lost at the close of the preceding work year.

Appellant then appealed the decision to the Board of Appeals and Review of the Commission. By a letter of November 8, 1963, the

Board affirmed the previous decision of the Appeals Examining Office in all particulars. (JA 74)

Thereupon, Mrs. Mendelson sought judicial review of her dismissal by filing a complaint for declaratory judgment in the United States District Court for the District of Columbia. In due course, her case was adjudicated on the basis of cross motions for summary judgment, in accordance with the common practice for disposition of so-called "civil service" cases such as hers. On January 19, 1965, Judge William Jones entered an Order granting the appellees' motion for summary judgment, and denying the motion of appellant. No opinion was written by the District Court. From this decision appellant had taken her appeal to this Court.

CONSTITUTIONAL PROVISION, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Executive Order 10987, 3 C.F.R. 519 (1959-1963 Comp.)

"Sec. 1. The head of each department and agency, in accord with the provisions of this order and regulations issued thereunder by the Civil Service Commission, and to the extent specified in such regulations, shall establish within the department or agency a system for the reconsideration of administrative decisions to take adverse action against employees."

Executive Order 10988, 3 C.F.R. 521, 527:

"Sec. 14. The head of each agency, in accordance with the provisions of this order and regula-

tions prescribed by the Civil Service Commission, shall extend to all employee in the competitive civil service rights identical in adverse action cases to those provided preference eligibles under section 14 of the Veterans' Preference Act of 1944, as amended. Each employee in the competitive service shall have the right to appeal to the Civl Service Commission from an adverse decision of the administrative officer so acting, such appeal to be processed in an identical manner to that provided for appeals under section 14 of the Veterans' Preference Act. . . "

Civil Service Commission Regulations § 771.214, 5 C.F.R. 177:

"The agency appeals system shall provide the employee an opportunity for a full and fair hearing on the adverse action, personally or through or accompanied by his representative, before a hearing committee.

Civil Service Commission Regulation § 771.224, 5 C.F.R. 179:

"The agency appeals system shall require the authorized agency official to consider the entire appellate record and after such consideration, to make his decision in which he may sustain the previous decision to take adverse action, modify the previous decision by substituting a less severe action, or reverse the previous decision."

STATEMENT OF POINTS

The trial court erred in granting appellees' motion for summary judgment and denying appellant's motion for summary judgment because:

1. The NASA official charged with the duty of reviewing appellant's appeal failed to review, or cause to be reviewed, the evidence received at her hearing, thereby depriving her of the procedural fair play required both by agency regulations and due process.

2. The findings made by the Civil Service Commission were ambiguous and inadequate.

3. The inference of fraud by NASA and the Civil Service Commission was arbitrary, capricious and unreasonable.

SUMMARY OF ARGUMENT

Appellant's dismissal from her government employment was unlawful on at least three separate and distinct grounds.

First, the review of her dismissal was procedurally defective because appellant was deprived of a fair administrative review of her discharge by NASA, the employing agency. Specifically, she was entitled under NASA regulations to a review of the evidence adduced in the hearing before the *ad hoc* committee. Dr. Robert Seamans, the reviewing official charged with the duty of providing such a review, instead summarily rejected the committee's recommendations without either reviewing the substantial evidence taken by it, or causing such a review of the evidence to be made. His action invalidated her dismissal since it is a well established rule of federal administrative law that an agency is absolutely bound to abide by its own regulations. The unilateral rejection of the *ad hoc* committee's unanimous recommendations, without any review of the evidence upon which the recommendations were based, also deprived appellant of a fair hearing and review under the due process laws of the 5th Amendment to the U.S. Constitution.

A second vice in the processing of appellant's case were the ambiguities and inadequacies of findings made by the Civil Service Com-

mission. The Commission findings as to the alleged 21 falsifications of time and attendance reports totally blurred the distinction between honest and dishonest mistakes. They totally ignored the possibility that appellant might have "deliberately" attempted to offset previously unclaimed overtime without necessarily having possessed fraudulent intent or venal motives. Since the record strongly suggests that such attempts were based simply on a misunderstanding of her rights (as to recouping previously unclaimed overtime) the Commission findings were unresponsive to the issues in a basic sense. Furthermore, the findings were completely silent on the question of whether the inaccurate leave report was made on the basis of an innocent belief by appellant that she could permissably recoup leave time "lost" at the end of the previous work year.

Finally, the inference of "fraud" on appellant's part was clearly arbitrary and capricious, lacking any warrant in the evidence. Both NASA's Dr. Seamans and the Civil Service Commission treated this case as one in which appellant was charged not merely with making false reports but with making fraudulent reports as well. NASA might have sought to discipline the appellant on the less serious charge of falsification alone. But it did not do so. And, having charged the graver offense, it must be held to proof of a higher order, including at least some evidence of the requisite fraudulent intent. Inasmuch as there is no evidence of such intent other than proof of the admittedly inaccurate transactions themselves, and there is strong countervailing proof, including opinion evidence by appellant's immediate supervisor that her actions were <u>not</u> fraudulently motivated, it follows that the inference of fraud was arbitrary and entirely unreasonable.

ARGUMENT

I.

Appellant Was Denied Procedural Fairness in the Review of Her Discharge by NASA and the Civil Service Commission

1. The Failure of Dr. Seamans to Review or Cause to Be Reviewed the Evidence Taken by Ad Hoc Committee Was Unlawful and Denied Appelant a Fair Administrative Review

For the convenience of Dr. Robert Seamans, Jr., the NASA reviewing official receiving its recommendation, the *ad hoc* committee prepared a report stating its findings and recommendations. The committee unanimously found what it described as a "reasonable doubt" that Mrs. Mendelson had filed erroneous time reports with the "fraudulent" intent or purpose, as charged by management. The committee deemed it more likely than not that some of the erroneous claims for overtime were made "consciously or unconsciously" as setoffs against earlier overtime hours she had worked but for which she had not claimed compensation. The committee found it credible that Mrs. Mendelson had sought to recover two days of "leave" she had lost at the end of the previous year, on the basis of her innocent misunderstanding of her superior's discussions, and the additional fact that this had been the prevailing custom in the Pentagon where she worked before joining NASA.

Principally on the basis of these findings, the committee unanimously recommended against a discharge, as too harsh a penalty, favoring instead a suspension for no more than 120 days.

Dr. Seamans summarily rejected the recommendation.

He did so without having reviewed or evaluated any of the actual evidence taken by the *ad hoc* committee. By his own declaration in his letter of May 27 announcing his rejection of the committee's recommendation, his decision was based only on an examination of the committee's report.[1]

Contrary to the NASA position,[2] appellant contends that Dr. Seamans was obliged to review the evidence itself, or at least to cause such a review to be made, if he was to reject the committee's unanimous recommendations. The primary reason for this is that internal NASA regulations (promulgated under the compulsion of Civil Service Commission regulations) required such an examination. Since it is a fundamental tenet of Federal administrative law that an agency is absolutely bound to abide by its own regulations, it follows that it was unlawful for Dr. Seamans to decide appellant's case without affording her the full review to which she was entitled. Appellant further contends that, regardless of this administrative rule of law, she was entitled as a matter of due process to a review and decision by Dr. Seamans based on the evidence of record rather than the committee's report alone.

---

[1] In his letter of May 27 he asserts that his decision is based on a perusal only of the committee's report, rather than a reading of the transcript of evidence itself. He said:

> "From my review of the Committee report and the evidence contained therein, I have concluded that the submission of false time and attendance reports by you constituted the kind of dereliction of duty that is a serious offense against good morale and discipline." (Emphasis supplied) (JA 61)

[2] The contention that Dr. Seamans' refusal to read the transcript and review the evidence constituted an unlawful denial of a fair review to appellant was made before the Civil Service Commission by counsel who represented her there. This was nowhere denied. In his oral argument, the NASA attorney stated plainly that:

> "It is the contention of the agency that there is no requirement that Dr. Seamans read every written word and every exhibit introduced in this lengthy agency hearing . . ." (CSC Tr. 86)

We may first consider the nonconstitutional contention.

Executive Order 10987, 3 C.F.R. 519, promulgated on January 17, 1962, provides in pertinent part that:

> "The head of each department and agency, in accord with the provisions of this order and regulations issued thereunder by the Civil Service Commission, and to the extent specified in such regulations, shall establish within the department or agency a system for the reconsideration of administrative decisions to take adverse action against employees."[3]

Pursuant to this authorization, the Civil Service Commission promulgated regulations to effectuate the requirements of the Order. 5 C.F.R. 175 *et seq.* Among
ments of agency *ad hoc* committees, like the one involved below, and procedures for intra-agency review of their recommendations.

Regulation §771.214, 5 C.F.R. 177, provides that an agency appeals system must provide the employee with "an opportunity for a full and fair hearing . . . personally or through . . . a representative . . . ." (emphasis supplied) Regulation §771.218, 5 C.F.R. 178, also states that a "hearing record must be made, and Regulation §771.219, 5 C.F.R. 178, provides that the hearing committee must prepare a "report," as was done by the NASA *ad hoc* committe.

Regulation §771.224, 5 C.F.R. 179, covers intragency review of the committee recommendations:

> "The agency appeals system shall require the authorized agency official to consider the entire appellate record and, after such consideration, to make his decision . . . ."

---

[3] Although Executive Order 10987 has been adverted to by this Court, *Scott v. Macy*, ____ U.S. App. D.C. ____, ____ F.2d ____, No. 18483, decided June 18, 1965, the case at bar appears to be the first in which the Court has been called upon to make a definitive construction of any agency regulation promulgated thereunder.

The relevant NASA regulations, issued pursuant to the foregoing Civil Service regulations, are found at Chapter 17, NASA Personnel Regulations, subpart 9e:

> "The responsible management official will ensure that a full, impartial and expeditious consideration is made of the entire appellate record." (emphasis supplied)

By the force of this language, Dr. Seamans was obviously obligated to afford appellant a review of her case on the basis of the "entire appellate record." The term "record" in the NASA regulations is clearly distinguished from the term "report," as it is in the Civil Service Commission regulations. The contents of the "record" are enumerated in Chapter 17, NASA Personnel Regulations, subpart 11g. They specifically include "a verbatim transcript of the testimony . . . ." If the reviewing official is compelled to insure a review of the "entire appellate record" this necessarily encompasses a review of the "transcript of the testimony." Since Dr. Seamans concededly failed to do this, the official NASA review of appellant's case was inadequate under NASA's own regulations.

It has long been established in our Federal jurisprudence that an executive agency is bound by its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

As recapitulated by Justice Frankfurter, the law is that:

> "An executive agency must be vigorously held to the standards by which it professes its action to be judged . . . Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed . . . This judicially evolved rule of admin-

> istrative law is now firmly established . . ."
> *Vitarelli v. Seaton, supra,* at 359 U.S. 547.[4]

The Supreme Court decision most apposite to the facts at bar is perhaps *Service v. Dulles, supra.* There, the petitioner had been discharged from his State Department job on security grounds. Internal State Department regulations provided that in such a case the decision to dismiss "shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." *Id.* at . It appeared that the Secretary of State had not read or considered the evidence contained in the petitioner's file. Instead, he had made his decision at the instance of the Loyalty Review Board, which had investigated the employee and recommended that he be fired. In light of the fact "no attempt was made to comply with . . . the Regulations . . ." *ibid.*, the Court held that petitoner's discharge was improper, and ordered his reinstatement.

The teaching of *Service* is perfectly applicable here. It is in fact more pertinent here, since in *Service* the departmental official acted in accordance with the recommendations of the Loyalty Review Board. In the instant case Dr. Seamans not only neglected to read and appraise the evidence himself, but he rejected the conclusions of the *ad hoc* committee which had examined it. If he was to jettison their conclusions, it was of the utmost importance that he make an independent appraisal

---

[4] As noted by Justice Frankfurther, this rule is judge-made. It is not grounded upon the Administrative Procedure Act, 5 U.S.C.A. §1001. Accordingly, the mere fact that Civil Service discharge proceedings may be excepted from the Administrative Procedure Act, see *Deviny v. Campbell*, 90 U.S. App. D.C. 171, 175 (1952), 194 F.2d 876; *Hargett v. Summerfield*, 100 U.S. App. D.C. 85, 88 (1957), 243 F.2d 29, is of no relevance here. The judge-made principle requiring executive agencies to abide by their regulations has been repeatedly applied to in favor of Government employees in disputes arising out of their employment. See, in addition to cases discussed in the text, *e.g.*, *Deak v. Pace*, 88 U.S. App. D.C. 50 (1950), 185 F.2d 997; *Borak v. Biddle*, 78 U.S. App. D.C. 374 (1944), 141 F.2d 278; *Hurley v. Crawley*, 60 App. D.C. 245 (1931), 50 F.2d 1010.

of the evidence. As it stands, his action not only flouted the general rule of administrative law, but was arbitrary in the extreme.

The arbitrary character of his action naturally raises constitutional issues. Even apart from the general rule of administrative law discussed above, appellant submits that Dr. Seaman's failure to read the evidence was a denial of due process and the fair hearing to which she was entitled.

As long ago as 1938 the Supreme Court recognized that administrative agencies may not regulate property rights without according a full and fair hearing to the affected parties. *Morgan v. U.S.*, 304 U.S. 1 (1938); see also *Reilly v. Pinkus*, 338 U.S. 269 (1949); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920). The requirement of a fair administrative hearing has also been applied to executive interferences with individual liberty. See, *e.g.*, *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (deportation without fair hearing held denial of due process).

In more recent years this principle has been applied to an individual's interest in his Governmental employment. In *Wieman v. Updegraff*, 344 U.S. 183 (1952) and *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956) the Court held that a public employee's interest in his employment is protected by the due process clauses of the United States Constitution.

In *Greene v. McElroy*, 360 U.S. 474 (1959), a case "which overshadows all previous case law on the right of federal employees to full hearings on questions of discharge," Davis, Administrative Law Treatise 82 (1964 Supp.) the Court held that, absent express authorization from Congress or the President, an executive agency could not revoke a private employee's security clearance, and thus indirectly deprive him of a job, without an adequate hearing, including the traditional cross-examination and confrontation. Though it carefully abstained from a constitutional adjudication, the decision is freighted with constitutional overtones. *Id.* at 360 U.S. 507.

From the *Greene* decision there emerges a clear and insistent implication that the claim of a Government employee to a fair and full hearing on his proposed discharge is a matter of Constitutional dignity.[5]

More recently the Supreme Court has held that an applicant for admission to a State bar is entitled to due process in the hearing on his application. *Wilbner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) Citing *Greene*, the Court noted that "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." *Id.* at 360 U.S. 496-497. (emphasis supplied)

Thus, the Supreme Court has squarely held that due process attaches to the procedures whereby a State decides applications for employment, as well as procedures relating to discharge from State employment. It has also strongly intimated that due process controls the procedural machinery by which the Federal Government deprives individuals of their jobs, even by the circuitous task of stripping them of security clearances. This intimation is so clear that at least one District Court has articulated plainly what it deemed to be the latent premise of the *Greene* decision.

---

[5] A District Court has since explicitly held this in *United States v. Rasmussen*, 222 F. Supp. 430, 439 (D. Mont. 1963), a case involving the Government's attempted dismissal of an office manager for a county agricultural stabilization conservation committee, an arm of the Agriculture Department. ("I conclude that, by reason of the refusal of the state committee at the hearing . . . to apprise defendant of the evidence against him and grant him the rights of confrontation and cross-examination, there was a . . . denial of due process in the conduct of the hearing.") 222 F. Supp. at 439.

It is true that in *Bailey v. Richardson*, 86 U.S. App. D.C. 248 (1950), 182 F.2d 46, *aff'd by equally divided Court*, this Court indicated in a 2 to 1 decision that there is no constitutional requirement for a fair hearing in civil service cases. But that decision was predicated upon the now discredited notion that an individual's interest in Government employment is not "property" or a "contract" subject to Constitutional protection of due process. Id. 86 U.S. App. D.C. at 259. The subsequent decisions in *Wieman* and *Slochower*, *supra*, anninilated this premise. See also *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 725 (1951).

Given these premises, it seems to be almost on *a fortiori* conclusion that due process attaches to the procedures for dismissal of the appellant followed in the case at bar. She, after all, starts with certain statutory protections. She is covered by the Lloyd-LaFollette Act, 5 U.S.C.A. §652, insulating her from discharge except for such "cause" as will "promote the efficiency of the Service," along with certain procedural guarantees. More to the point, Executive Order 10987, promulgated under the authority of Art. II of the Constitution and the Civil Service Act, 22 Stat. 403, 5 U.S.C.A. 632, *et seq.*, commands the Civil Service Commission to prescribe regulations governing intragency appeals from adverse actions, and specifically requires that such appeals systems entitle the individual worker to a "hearing." Acting on this authorization, the Commission has promulgated regulations, carrying the force of law, see *United States v. Mersky*, 361 U.S. 431, 438 (1960), which required that plaintiff be afforded a "full and fair hearing" by NASA.

In light of the procedural hedges against discharge guaranteed to appellant by Congress and the Executive, it seems plain that these review procedures were controlled by the standards of due process.[6] In a sense, of course, it is perhaps academic whether we apply constitutional standards or not, since the standards of procedural due

---

[6] It bears noting that plaintiff's contention here is not at war with the older body of law to the effect that Government employment is a "privilege" bestowed at the discretion of the Executive. *Keim v. U.S.*, 177 U.S. 290 (1900); see also *Re Hennen*, 13 Pet. 230, 259 (1839). For the purpose of appellant's constitutional analysis here it may be assumed that this is still valid law. But the normally unfettered Executive discretion is now hedged about by the statutory and Executive decrees described above. That being so, the procedural redress established in the statutory and other law must be implemented in a manner that comports with the dictates of constitutional due process. See *Griffin v. Illinois*, 351 U.S. 12 (1956) holding that, although a State is not constitutionally compelled to provide a system for appellate redress of criminal convictions, once it elects to do so, the system must be implemented in accordance with the due process and equal protection clauses of the Constitution.

process in this case are apparently coextensive with the regulatory standards of a "full and fair hearing." At all odds, it is indisputable that one in Mrs. Mendelson's position is not accorded a "full and fair hearing" when a single reviewing official rejects the unanimous recommendation of a hearing committee, without reading and evaluating the evidence upon which the committee reached its conclusions. See *Morgan v. U.S.*, 298 U.S. 468 (1936); 2 Am. Jr. 2d 248 ("Where a hearing is required . . . the rule generally adhered to is that when an administrative officer makes or participates in a decision without having been present when the evidence was taken, due process and the concept of a fair hearing . . . require that he consider and appraise the evidence himself.")

The right to a decision based upon a fair appraisal of the evidence is implicit in the concept of a "hearing." Without knowing what the reviewing official relies on, how can his decision be attacked on further appeal? Unless the official considers all the evidence, of what utility is the "right" to offer evidence in one's defense? By disdaining to read or have the record read or to illiminate his own decisional processes, the NASA reviewing official effectively transformed Appellant's right to a "full and fair hearing" into an empty charade. Just as the "right to a hearing is meaningless without notice," *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956), so also is it meaningless without some assurance that the evidence submitted will be read and understood. A "hearing" implies the opportunity to offer evidence and argument before "a tribunal bound not only to listen but to give legal effect to what is established." *Washington ex rel Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510 (1911); see also *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915); *Garfield v. U.S.*, 211 U.S. 249 (1908); *Ray v. Norseworthy*, 23 Wall. 128 (1875); *NLRB v. Prettyman*, 117 F. 2d 786, 790 (6th Cir. 1941).

As the Supreme Court explained in *Morgan v. U.S., supra*, at 298 U.S. 480, 481:

> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

As the Supreme Court has also stated in a related context, "An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat . . . This is inherent in the meaning of 'determination.' It is implicit in a government of laws and not of men." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 136 (1951).

The reviewing decision of Dr. Seamans below was just such an arbitrary "fiat" as described by the Court. It was made without a reading and evaluation of the evidence. Not only was this flagrant infraction of appellant's rights under Federal administrative law, and a subversion of the regulatory scheme of intragency review of adverse action; but it was additionally, in appellant's view, a clear denial of the due process to which she was entitled.

In civil service cases like this, the principal function of this Court is to rectify procedural violations, and arbitrary or capricious action. *E.g., Pelicone v. Hodges*, 116 U.S. App. D.C. 32 (1963), 320 F.2d 754; *Wittner v. U.S.*, 76 F. Supp. 110 (Ct. Cls. 1948). The action complained of her was both arbitrary and a procedural infraction.

2. The Civil Service Commission Failed To Make Adequate Findings

Appellant never contested the fact that discrepancies appeared between the guard registers and her own time and attendance records for the 21 days in question. Her position was that she simply could

not recollect, hence could neither affirm nor deny the discrepancies. She did contend, however, that if such discrepancies existed they were excusable because: (1) she had made some "honest errors" in reporting attendance, during the hectic period of her employment and (2) in any event, she had worked a substantial number of overtime hours without pay, which could be regarded as something of an offsetting factor.

Dr. Seamans did not address himself to these or any other specific factual considerations, merely rejecting the *ad hoc* committee's recommendations without discussion of the evidence.

The appeals examining office of the Civil Service Commission, in its "analysis and findings," affirmed the decision by Seamans, but left certain critical ambiguities in its findings of fact.

On the one hand, in response to contention (1), it found that ". . . we cannot conclude that [appellant's unusually heavy work] activity . . . and the demands placed on the [appellant] represent a valid explanation of her failure to . . . submit accurate . . . records of . . . overtime." On the other hand, it answered contention (2) in this fashion:

> "Assuming that there may have been days when she worked more hours than she reported, this would not necessarily indicate that her excessive claims on weekends were honest error. A more logical conclusion would be that excessive claims were deliberately made to offset the unclaimed overtime."

From the foregoing language, it is left uncertain precisely what the Commission meant to find. The findings do not state that none of the 21 transactions were "honest errors," nor is it suggested how many, if any at all, fell into the category of simple oversights. It does not state that all 21 transactions represented "deliberate" at-

tempts to offset the previously unclaimed overtime, though it unquestionably implies that some were. Of the latter, however, it fails even to consider whether the "deliberate" attempts were nonetheless innocent attempts, based on appellant's misunderstanding of her rights. And by failing to consider the possibility of innocent attempts to recoup previous overtime, the Commission naturally does not even approach the vital issue of whether, or to what extent, an inference of innocence would affect the suitability of the punishment of dismissal imposed upon appellant — the ultimate punishment that can be visited upon any civil servant in a proceeding of this character — notwithstanding that an assessment of the relation between the charges and the penalty was within the scope of its review powers. See *Pelicone v. Hodges*, 116 U.S. App. D.C. 32, 35 N. 9 (1963), 320 F.2d 754, 757, ("Even if Charge 3 had been held valid, the question would remain whether it alone would constitute a sufficient basis for discharge."); *Cuiffo v. U.S.*, 137 F. Supp. 944 (Ct. Cls. 1955).

It is a familiar tenet of administrative law that an administrative body's order must be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 169 (1962). The classic and initial expression of this doctrine is found in *Securities & Exchange Comm'n v. Chenery Corp.*, 351 U.S. 12, 18 (1947):

> "[A] . . . fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . ." (emphasis supplied)[7]

---

[7] The Supreme Court has most recently reemphasized this doctrine in *FTC v. Consolidated Foods Corp.*, ____ U.S. ____, 33 Law Wk. 4099, 4379, Jan 18, 1965), saying:

(Continued on following page)

The obvious corollary of this familiar principle is that an agency, such as the Civil Service Commission in the case at bar, must in fact explicate in precise fashion the grounds of its decisions. "While findings need not be formulated in an enumerated sequence, helpful as that would be, they must at least appear in a Commission's decision with unambiguous clarity, and they must be logically related to its conclusions." *Denver & Rio Grande W. R. Co. v. Union Pac. R.Co.*, 351 U.S. 321, 341 (1956) (dissenting opinion).

Furthermore, there is a clear statutory mandate compelling the Civil Service Commission in a case like this "to submit its findings and recommendations to the proper administrative officer and . . . send copies . . . to the appellant . . .," 5 U.S.C.A. 863.[8]

Manifestly, the Commission failed to make adequate findings in the case at bar. The factual theory of the overtime claims upon which its recommendation rested is ambiguous. Moreover, it failed to respond at all to appellant's suggestion that at least some of the allegedly "deliberate" inaccuracies in time reports were nonetheless "innocent" in the sense that appellant was not culpable in making them, assuming consciously or otherwise that she was only claiming in the aggregate the compensation to which she was entitled. Not to respond to a par-

---

(Footnote 7 continued from preceding page)

> "This Court must review administrative findings as they are made by the agency concerned, and if the evidence will not support the findings and theory upon which the agency acted, an affirmance of the agency's order cannot properly rest upon a reassessment of the record by us."

This Court has also recognized that the foregoing rule of administrative law is not limited to regulatory decisions of regulatory agencies, as appellees seemed to argue below. (R.). In *Shachtman v. Dulles*, 96 U.S. App. D.C. 287, 290 (1955), 225 F.2d 938 , the Court applied the rule to a decision of the Secretary of State to withhold a citizen's passport.

[8] The requirement for "findings," expressed in the Veterans Preference Act, *supra*, is expressly made applicable to classified employees such as Mrs. Mendelson by Section 14 of Executive Order 10988, 3 C.F.R. 136 (1962 Supp.)

ty's contention is error in itself. *Burlington Truck Lines, Inc. v. U.S.*, *supra*, at 371 U.S. 168.

Heightening the inadequacy of the Commission findings is the fact that they must be contrasted directly with the conclusions of the NASA *ad hoc* committee. Technically, the appeal to the Commission was taken from the reviewing decision of Dr. Seamans. But, as noted, his spare and ineluctable letter was merely an announcement of a decision; it contained no elaboration of reasons, or independent evaluation of the evidence. Accordingly, the Commission findings must be judged as if they were a direct reversal of the *ad hoc* committee findings, for in substance that is exactly what they were. In effect and in law, the Commission reversed the *ad hoc* committee. Highly pertinent in this connection is the doctrine of *Blackmar v. U.S.*, 120 F. Supp. 408 (Ct. Cls. 1954), which intensifies the deficiencies of the Commission opinion in this case. Here, a regional examiner of the Civil Service Commission had ordered the reinstatement of a discharged Government employee. He had made findings of fact and recommendations, which had been furnished the employee. The employing agency appealed to the Commission's Board of Appeals and Review, which reversed the examiner's recommendations, without making an independent appraisal of the evidence and its own findings of fact. The Court of Claims held this to be a procedural error in itself, and reversed. It said:

> "We agree that where the decision of the regional office is merely affirmed on appeal additional findings are unnecessary. In such a situation the plaintiff has been furnished the 'finding & recommendations' on which the disposition of his case was based . . . However, the construction of the statute urged by defendant is much too narrow where there is a reversal on appeal. If the statute contemplates the detailed findings which the regulations require of the regional office . . . it seems reasonable to conclude that a later administrative adjudication revers-

> ing the Region must at the very minimum be sufficiently comprehensive to permit a determination as to compliance with the procedural requirements of the Veterans Preference Act. To hold otherwise would render the requirement for findings meaningless." 415

Inherently ambiguous and wholly unresponsive to fundamental issues, the purported "findings" of the Commission here "render the requirement for findings meaningless."[9]

As the Supreme Court has aptly stated:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its . . . discretion. We are not prepared to . . . accept such adjudicatory practice." *Burlington Truck Lines, Inc. v. U.S.*, *supra*, at 371 U.S. 168.

The absence of adequate findings here renders the system of intragency appeals meaningless. Appellant is entitled to reinstatment on this ground alone.

II.

The Inference That Appellant Acted With a Fraudulent Intent Was Arbitrary, Capricious and Unreasonable

In this case it is plain beyond peradventure that the NASA management charged appellant with deliberate and calculated fraud. The Civil Service Commission explicitly conceded as much. See text *supra* at p. 5. Although it could have proceeded on a charge that did

---

[9] The letter of the Civil Service Commission's Board of Appeals and Review, affirming the findings and recommendations of the Appeals Examining Office, did not make any new findings or analyses nor did it alter the analysis made by the Appeals Examining Office.

not include the element of fraud, it did not elect to do so. It charged the more serious offense and must, accordingly, be stringently held to proof of the element of fraudulent intent or purpose. *E.g., Pelicone v. Hodges, supra,* at 116 U.S. App. D.C. 34-35; *O'Brien v. U.S.,* 284 F.2d 692 (Ct. Cls 1960); *Kutcher v. Higley,* 235 F.2d 505, 98 U.S. App. D.C. 278, 280 (". . . only findings upon the charges, specifically identified, can constitute the 'reasons' required to be stated in the ultimate adverse ruling . . . [T]he discharge of a classified employee must be based upon a charge preferred in advance."); *Mulligan v. Andrews,* 93 U.S. App. D.C. 375 (1954), 211 F.2d 28.

Under these circumstances, the evidence is unquestionably deficient. It cannot fairly sustain an inference of actual fraud, on the part of Mrs. Mendelson.

Proof of fraudulent intent or an intent to deceive is considered an indispensable element of any claim for civil redress of deceit or fraud. *E.g., Cooper v. Schlesinger,* 111 U.S. 148 (1884); *Lord v. Goddard,* 13 How. 198 (1851); 23 Am. Jr. 2d 899, 901.

The inference of fraud made both by the NASA reviewing official and the Civil Service Commission in this case is altogether unwarranted by the evidence. Not only is the inference unwarranted by the evidence, but it is drawn in cavalier disregard of the evidence, which points quite clearly to the contrary.

The only evidence offered by NASA was evidence of the discrepancies between guard registers and the appellant's own records. Such discrepancies were never contested by appellant. She took instead, the only position open to a woman of candor and integrity, namely, assuming the agency's evidence to be correct but at the same time observing that her mistakes had not been fraudulent or willful.

The only evidence bearing directly on the issue of fraudulent intent was the evidence of appellant's 11-year honorable employment

record with the United States Government, the impressive list of citations she had received, (including one from NASA Administrator James Webb) and the vitally important opinion evidence of her various NASA superiors. Commissioner John S. Patterson, of the Federal Maritime Commission, and a former NASA supervisor of appellant's, gave firm and convincing testimony as to his belief in her excellent character and integrity. To like effect was the testimony of Colonel Wilfred Smith, who had known appellant's work when he had been detailed to NASA in 1960 and 1961. Dr. Morris Teper, a NASA superior at the time of her discharge, testified that, knowing the charges against her, he would still be willing to hire appellant as his own secretary. Mr. Carl Freedman was appellant's immediate supervisor throughout the time relevant to this case and was such at the time of her dismissal. The NASA *ad hoc* committee characterized him as the man "who of all the witnesses at the hearing had the greatest opportunity to form a judgment about Mrs. Mendelson's character . . ." He testified that he would welcome the continues services of appellant as his secretary. More important, he testified unequivocally that he felt she had not acted fraudulently:

> "Yes. I think it was negligence, if you want to call it that, sloppy record keeping, but I just don't believe it was done with the intention of falsification or defrauding the Government." (*ad hoc* committee hearing transcript 591-592)

There was no countervailing evidence whatsoever, indicative of a fraudulent purpose or intent. Under these circumstances, the findings of fraud were manifestly arbitrary and unjust. They were analogous to a conviction of crime without evidence which, as the Supreme Court has noted in *Thompson v. Louisville*, 362 U.S. 199, 206 (1960), constitutes a denial of due process.

This case also bears some resemblance to *Cuiffo v. U.S.*, another civil service case, where the plaintiff was discharged for having un-

lawfully taking Government property, some pieces of lumber, from the New York Port of Embarkation. The plaintiff enjoyed a reputation for honesty and a good work record, as does the appellant at bar, and he explained his taking of the property by saying "he thought the property was of little value to the Government and might otherwise be destroyed or given away." 137 F. Supp. 949. He candidly admitted his mistakes, in other words, as did Mrs. Mendelson. He was punished by a 320-day suspension by the Grievance Review Board. The Court of Claims noted that ". . . we are under the distinct impression that plaintiff did not realize he was doing anything wrong when he took the lumber. He readily admitted he had taken it, and volunteered . . . that he had done so on other occasions." 137 F. Supp. 945. The Court rendered its judgment in language which aptly describes the situation at bar. The punishment visited upon the plaintiff, it said:

> ". . . was a complete departure from fair dealing and tolerable personnel policy. We think it was so arbitrary and unfair that it should be set aside." 137 F. Supp. 950

The treatment of Mrs. Mendelson was altogether intolerable. It is the kind of treatment that is destructive of morale and undermines all hope of sanity in the administration of Government personnel policies.

Appellant's dismissal should be declared by this Court to have been procedurally defective, as well as arbitrary and unreasonable.

CONCLUSION

For the foregoing reasons the order of the District denying appellant's motion for summary judgment should be reversed.

GLENN R. GRAVES
625 Washington Building
Washington, D. C.

Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,310

AGATHA MENDELSON, APPELLANT

v.

JOHN W. MACY, JR., Chairman, U.S. Civil Service Commission, et al., APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ARNOLD T. AIKENS,
ALLAN M. PALMER,
Assistant United States Attorneys.

(C.A. No. 299-64)

QUESTIONS PRESENTED

1) Was there any procedural error committed in effecting appellant's dismissal from NASA, when a regulation required a reviewing official within the agency to consider the entire appellate record before rendering his decision and, before he rendered his judgment on the merits sustaining appellant's dismissal, the official gained an understanding of a transcript of record, over 600 pages in length, by reading an exhaustive seventy page summary thereof which was conceded by appellant's counsel to be a long and very good summary of the evidence?

2) Were the findings of the Appeals Examining Office, Civil Service Commission, adequately enunciated in its decision which sustained appellant's removal from the federal service; especially when appellant perfected a further appeal to that agency's Board of Appeals and Review, found no deficiency in the findings to hamper pursuit of that appeal and, in fact, did not urge any procedural irregularity with respect to the findings?

3) Was there a rational basis in the record for the conclusions that appellant falsified her time and attendance reports and thereby fraudulently obtained overtime compensation, when appellant never denied the filing of twenty-one such false reports but claimed that they were the product of "honest errors"?

INDEX

TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,310

AGATHA MENDELSON, APPELLANT

v.

JOHN W. MACY, JR., Chairman, U.S. Civil Service Commission, et al., APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Mr. Stoller's notification letter of December 5, 1962 (See Br. 2-3) charged appellant [1] with the following specific violations:

> "a. During the period between January 27 and May 30, 1962, you claimed overtime work in excess of the time you were recorded as being present

[1] At that time appellant was known as Mrs. Agatha Kinzie. She remarried during the course of these proceedings.

for duty on 11 specific occasions. The specific dates and times involved are contained in Attachment #1 to this letter. Based on the information contained in the Guard Register maintained in FOB#6, which records the times you entered and left the building on these specific occasions, it is concluded that you claimed at least 16 hours and 41 minutes of overtime work in excess of the time you were actually present for duty on those days. On each occasion, you recorded this information on the time and attendance reports (SF 1130) for the pay periods in question, and you presented these erroneous reports to your supervisor for certification, representing them to be accurate and correct in all respects.

* * * *

c. Between June 30 and October 13, 1962, you claimed overtime in excess of the hours you are recorded as being present for duty on 10 specific occasions. The specific times and dates covering these instances are listed in Attachment #2 to this letter. Based on a review of the Guard Register maintained in FOB#6, which reflects the times you signed in and out of the building on these occasions, you claimed at least 28 hours and 45 minutes of overtime work in excess of that which you performed. For the pay periods in question, you included these excess overtime claims on time and attendance reports (SF 1130), which you then presented to your supervisor for certification, representing them to be accurate and correct in all respects.

d. During the period between May 31 and June 15, 1962, you were on leave visiting your daughter in Iowa. You returned to the office on Monday, June 18, 1962. You initially prepared your time and attendance report covering the period June 10 through June 23, 1962, reflecting that you were on leave for five work days during the week of June 10. Subsequently, however, you

> revised the time and attendance report for this period to show that you were in duty status on June 14 and 15. The revised time and attendance report was incorrect, and therefore constituted falsification.
>
> In performing the actions described above, you have committed an offense listed in the 'Table of Disciplinary Offenses and Penalties for Employees in NASA' contained in NASA Management Instruction 17-7-23 entitled 'Discipline'. Specifically, you are guilty of offense number four: 'Falsifying attendance record for oneself or another employee'. This offense is punishable by disciplinary action up to and including removal. Considering the number of occasions on which you falsified time and attendance records, and considering that you were warned in advance concerning the necessity for keeping accurate records of actual overtime work performed, removal is considered warranted." (J.A. 51-53.)

She was also reminded in paragraph b. of that letter:

> "On June 28, 1962, I issued a memorandum on the subject of overtime, stressing the need for reducing the amount of secretarial overtime required and emphasizing the importance of keeping a close watch on the actual use of overtime. Both you and Mr. Carl Freedman, your supervisor, participated in the preparation of that memorandum. You were well aware, therefore, both of my desire to control the abuse of overtime and of the necessity for control . . . ." (J.A. 52.)

The attached schedules, 1 and 2 revealed that all of appellant's excessive claims were for alleged weekend work save for one holiday. In addition, ten of these dates were subsequent to June 28, 1962; and on four of them appellant did not work at all *i.e.*, June 30, September 30, October 7, and October 13, 1962 (J.A. 54-55).

In her reply letter of December 11, 1962, appellant claimed that these errors were "honest mistakes" (See Br. 3) and also urged:

"Reference paragraphs *a* and *c* of your letter dated Dec. 5, 1962. Attached is a list of dates recorded, to the best of my knowledge, showing a possible explanation as to what made up the claimed overtime hours. This attachment shows (underlined in red) a column of hours you claim due the government. Under the column overtime not claimed by me, I have recorded estimated hours worked by me which I have not claimed as overtime. The hours shown was derived by me, based on the fact that the majority of the period in question I arrived at work every morning on or before 7:30 a.m. and never left the office before 5:00 or 5:50 p.m. each evening also some of these hours were taken from my calendar notes. . . .

There is also some time listed on the attachment to your letter for September 30, October 7, and 13 that was not paid to me. Right after receiving this check I realized that something was wrong so I held up cashing it trying to decide how to handle it, whether to see Mr. Thompson or whom to get this straightened out. I finally called Millie Morris (BFF) in payroll and she instructed me in preparing a new card and therefore it was all straightened out. At this time when these days got all mixed up I was preparing a birthday party for my fiance, planning a wedding in addition to work and everything was pretty hectic and muddled, nevertheless this 18 hours was never collected by me. On the attachment is the balance of time explained to the best of my knowledge. . . .

Reference d: In regard to the question of not taking leave for June 14 and 15. The reason I revised the time and attendance to show that I was in a duty status was to compensate me for some of the leave that I lost last year when our office was just being organized and we were so busy getting established and trying to hire personnel and etc., and was unable to take my leave. I did not realize that this was illegal. At previous government offices an office book was kept of leave that was lost because of necessity to keeping a person from using it at the end of the

year and it was marked off a little at a time as a person could be spared to use it. This was an informal record kept in the individual office. These 2 days in question however have now been corrected to annual leave per a memorandum to payroll dated November 19, 1962. I still did not realize that this was illegal."

In his December 27, 1962 notice of discharge (Br. 3-4) Mr. Stoller stated:

"I have reviewed your reply very carefully in order to arrive at a fair decision. I have also had the information contained in and attached to your letter of reply carefully checked against official records and the investigative file in this matter. It is my conclusion that your reply does not effectively refute the charges contained in my letter of December 5, [stating the reasons in detail.]" (J.A. 56.)

The *ad hoc* committee's advisory report to Dr. Seamans (Br. 4-5) was an exhaustive seventy page study and analysis of the case which had been characterized by appellant's counsel before the Civil Service Commission as "a long summary, and a very good summary of the evidence adduced at that hearing . . . [four day hearing before the *ad hoc* committee resulting in over 600 pages of transcript.] (C.S.C. Tr. 5.)[2] The committee found in part:

"2. *The 21 excess overtime claims*:

a. The Committee finds that the weight of the evidence indicates that the 21 excess overtime claims, taken as a whole, were not the result of honest errors or mistakes as contended by Mrs. Mendelson, even though it may be conceded that one or more may have been. The proportion of mistakes in Mrs. Mendelson's favor, as demonstrated by Management, is

[2] "C.S.C. Tr." refers to the transcript of testimony taken before the Civil Service Commission's Appeals Examining Office on July 11, 1963.

too great to permit the conclusion that all or most of them were honest mistakes.

In making this finding, the Committee has also taken into consideration that Management was able to cite additional instances of excess claims in Mrs. Mendelson's favor—such as those for March 4, 1962, and in the week of June 18th—which, while not a part of the 21 instances cited, tended to demonstrate further that the pattern of errors was consistently in Mrs. Mendelson's favor.

b. In connection with the foregoing finding, the Committee has also determined that the excess claims for September 30th, October 7th and October 13th, for which Mrs. Mendelson subsequently refunded the overtime pay received, were properly included in the total of 21 claims in her favor which were cited against her. The evidence on this point strongly supports Management's contention that Mrs. Mendelson was led to correct the errors involved for these three days only after it was demonstrated to her that the guard registers indicated she had not worked any overtime on the 3 days.

c. The Committee also finds that the mitigating circumstance alleged by Mrs. Mendelson as a reason for the excess claims were insufficient to explain or justify them. The task of keeping accurate time and attendance records is obviously not an onerous or time consuming one, and it is not possible to conclude that it was entirely the pressure or variety of Mrs. Mendelson's duties which kept her from maintaining such a record.

d. The Committee finds that Mrs. Mendelson apparently did work a substantial amount of extra time on weekdays which was not included in her overtime claims for those days. This is indicated by the entries on the spiral calendar record that she kept during portions of July and August, which show that she did customarily arrive at work well before 8:15 a.m. and frequently worked through all or part of her lunch period, but that she ordinarily did not include the time represented by these actions

in her daily overtime claims. Although this record was kept during only a very small period of the total time covered by the excess overtime claims, the number of entries involved is considered sufficient to establish a pattern indicating Mrs. Mendelson's customary work habits. . . .

* * * *

c. The question whether the falsification of the attendance report covering the two days of annual leave not charged for involved a fraudulent intent by Mrs. Mendelson was also brought into issue by Management in connection with this action. The first finding made by the Committee on this matter indicates its opinion that Mrs. Mendelson probably did not have an intent to make a fraudulent claim in this situation, but believed that she was only making up for leave which was in fact due her, and that this was a common practice, at least in other Government agencies. Also bearing on this question of intent is the fact that Mrs. Mendelson retained the carbon copy of the attendance report she prepared originally for the period involved, and even indicated on it that she had revised it to take credit for 2 days of annual leave lost from the preceding year. This fact suggests strongly that Mrs. Mendelson had no sense of wrong-doing, or purpose to commit a fraud, when she submitted the revised attendance report." (J.A. 41-43, 47.)

Dr. Seamans' letter of May 27, 1963 (Br. 5) affirmed appellant's removal from NASA:

". . . . You exercised your right to appeal this adverse action within this agency, and your appeal was heard by an ad hoc hearing committee which rendered its report on May 15, 1963. After a review of this report and consideration of the findings of fact and recommendations contained therein, I have determined that the removal action should stand.

From my review of the Committee report and the evidence contained therein, I have concluded that the submission of false time and attendance reports by

> you constituted the kind of dereliction of duty that is a serious offense against good morale and discipline. In light of the nature of this offense, I find that, despite the factors that led the Committee to recommend that your punishment be mitigated, your removal will promote the efficiency of the Federal service." (J.A. 61.)

Although appellant's brief intimates that the hearing before the Civil Service Commission's Appeals Examining Officer was somewhat less than plenary (Br. 6), we deem such intimations incorrect. Appellant was afforded and received a *de novo* hearing, and the resultant judgment to affirm her discharge was based upon the testimony taken at that hearing *and* the transcript of testimony and exhibits adduced before the *ad hoc* committee (C.S.C. Tr. 5, 41, 51). After a full review the Appeals Examining Office found *inter alia*:

> "In considering the merits of the appeal, we recognize that the reason given for the appellant's removal consists of two parts; (1) that she falsified time and attendance records and (2) fraudulently obtained overtime compensation. It seems clear that the intent was to charge, with respect to the matters covered in paragraphs a. and c. of the advance notice, that the appellant deliberately and purposefully falsified the records to secure compensation to which she was not entitled. . . .
>
> * * * *
>
> There is no question that the organization in which Mrs. Mendelson worked was unusually busy. It is conceded, also, that she was called upon to perform many functions not usually assigned to a secretary. However, the responsibility for maintaining time and attendance records was one which might normally be assigned to her as a secretary. The evidence shows that other employees for whose records Mrs. Mendelson was responsible did keep records of their overtime and there is no indication that their claims have been questioned. Furthermore, the record indi-

cates that the appellant was permitted to work such amounts of overtime as she considered necessary to complete her duties. On all the evidence, we cannot conclude that this activity in the office and the demands placed on the appellant represent a valid explanation of her failure to maintain and submit accurate and truthful records of her own overtime.

The appellant has also testified that she generally reported for work before the official opening hour, remained at work long after the official closing time, and frequently did not take the one half hour officially allowed for lunch. She has presented a tabulation purporting to show that the uncompensated overtime she performed on regular work days was in excess of the erroneous claims shown in the advance notice of proposed removal.

The evidence presented does not conclusively establish the extent to which the appellant may have performed overtime during her regular work week without compensation. Assuming that there may have been days when she worked more hours than she reported, this would not necessarily indicate that her excessive claims on weekends were honest error. A more logical conclusion would be that excessive claims were deliberately made to offset the unclaimed overtime. . . .

On review of all the record, we find that the pattern of error is such as to lead to a reasonable conclusion that the appellant did purposefully falsify her time and attendance record and fraudulently obtain overtime compensation. . . .

Whatever may have been the practice in other offices, *the appellant's action in showing herself on active duty status while she was on leave constitutes falsification of the time and attendance record. Clearly she was not entitled to recover any leave she may have lost in the previous year. In the absence of any clear showing that her action was authorized or approved, we must conclude that the record was deliberately falsified.* . . .

RECOMMENDATION

It is recommended that no change be made in the personnel action of the National Aeronautics and Space Administration in effecting the removal of Mrs. Mendelson on January 6, 1963." (J.A. 68, 71-73.) (Emphasis supplied.)

REGULATIONS INVOLVED

5 Code of Federal Regulations 109 § 77.134 (cum. supp. January 1, 1963) provided:

Agency appellate decision.

The agency appeals system shall require the authorized agency official to consider the entire appellate record and after such consideration, to make his decision in which he may sustain the previous decision to take adverse action, or may modify the previous decision by submitting a less severe action, or may reverse the previous decision.

5 Code of Federal Regulations 67 § 22.401(f) provided in pertinent part:

Decision. The decision on the appeal shall be made by the Chief, Appeals Examing Office, or by the regional director, as appropriate. The decision shall consist of the findings and recommendations, including an analysis of the evidence, the reasons for the conclusions reached, and the action to be taken by the agency.

NASA regulation 17-7-23

TABLE OF DISCIPLINARY OFFENSES AND PENALTIES FOR EMPLOYEES IN NASA provides in pertinent part:

NATURE OF OFFENSES	RANGE OF PENALTIES FOR STATED OFFENSES. 1st MIN	MAX
* * * *		
4. Falsifying attendance record for oneself or another employee.	Reprimand	Removal

NASA regulation 17-7-30, 9e, provides in pertinent part:

> *Scope of Appellate Review.* The review of an appeal will include but shall not be limited to a review of issues of fact and of compliance with NASA and Civil Service Commission procedural requirements for effecting the adverse action. The responsible management official will ensure that a full, impartial and expeditious consideration is made of the entire appellate record.

NASA Regulation 17-7-30, 9c (6), (7) provides:

> 9. *Processing of Appeals*
>
> c. *Employee's Appeal File.* Upon receipt of an employee's appeal, an employee's appeal file will be established by the installation personnel office. This file will contain all pertinent documents relating to the appeal, including but not limited to:
>
> (6) Written summary or transcript of the hearing (if held), including tape recording (if used).
>
> (7) Report of the Hearing Committee, if a hearing was held.

SUMMARY OF ARGUMENT

I

The requirement of a full consideration of the entire record means that the responsible official shall render a decision on the merits; the mechanics by which he gains an understanding of the entire record is not subject to appellate scrutiny. That official, in reaching his decision to sustain appellant's discharge, properly relied upon an exhaustive seventy page report which summarized the lengthy transcript of record. The report, never attacked as inaccurate and conceded by appellant's counsel to be such, was an adequate vehicle to provide Dr.

Seamans with a clear and complete understanding of the entire record.

In the alternative, we urge that the *de novo* hearing before the Appeals Examining Office, Civil Service Commission, wiped the slate clean of any prior procedural error committed by Dr. Seamans.

II

The findings of the Appeals Examining Office, Civil Service Commission, were clear, had a rational basis in the evidence and were directly related to the statement of charges originally filed against appellant. As indicated by this Court, the requirement of "findings" is to secure information to the discharged employee which he may utilize in seeking further administrative consideration of this case. We think it of some moment in this regard, that appellant's attorney who represented her before the Civil Service Commission, perceived no paucity of information in the findings now under attack disabling him from pursuing an effective appeal to that agency's Board of Appeals and Review, after the Appeals Examining Office rendered its decision. His brief and reply brief submitted to the Board are silent about the irregularity now pressed.

III

Evidence of the consistent pattern of so many—twenty-one—concededly erroneous overtime claims in appellant's favor, yielded a rational basis for the conclusions that she submitted the claims with knowledge of their falsity and, by supplementing her income in this fashion, that appellant thereby "fraudulently obtained overtime compensation." Thus supported, the decision to discharge her must, of course, stand.

ARGUMENT

I. The NASA reviewing official considered the entire appellate record before rendering his decision on the merits.

a. In support of her first argument, appellant conveys the erroneous impression that Dr. Seamans hastily determined to discharge her without carefully considering the recommendations of the *ad hoc* committee. At page twelve of appellant's brief we find:

> "Dr. Seamans summarily rejected the recommendation."

In fact, he did review the report with care and made the final judgment in the exercise of *his* discretion. This is supported by the following record facts.

1. The *ad hoc* committee report was submitted to Dr. Seamans May 15, 1963, and he informed appellant of his decision twelve days later by letter dated May 27, 1963 (J.A. 8, 61).

2. The letter itself stated: "After a review of this report and consideration of the findings of fact and recommendations contained therein, I have determined that the removal action should stand. From my review of the Committee report and the evidence contained therein, I have concluded . . . ." (J.A. 61).

3. At the hearing before the Civil Service Commission appellant's counsel, then Mr. Claude Dawson, inquired of Mr. Philip H. Sload, Headquarters Personnel Officer, NASA, the extent to which Dr. Seamans had considered the record.

> "Q. Did he tell you that he had read the findings of the Board of three, recommending her reprimand?
> "A. Yes, sir, he told me that he read them in considerable detail, and had studied the matter extremely carefully." (C.S.C. Tr. 61.)
>
> * * * *
>
> "A. Dr. Seamans called us up, . . ., to say that he had, as I said before, reviewed the report ex-

> tremely and carefully. he [*sic*] said he intended to talk to the committee chairman; and that he had, in effect, reached a decision; and that he had given it very careful consideration from his Government experience and his past industrial experience; . . ." (C.S.C. Tr. 79.)

Furthermore, that committee report has never in the course of this litigation been attacked as unfair, or incorrect in its treatment of the testimony or positions taken by the parties. Indeed, appellant's retained counsel has characterized the report as "a long summary, and a very good summary of the evidence adduced at that hearing . . . ." (C.S.C. Tr. 5).

With these facts in clear relief we turn to the applicable regulations which required that Dr. Seamans made "a full, impartial and expeditious consideration . . . of the entire appellate record" before rendering his decision. NASA regulation 17-7-30, 9e. (J.A. 98); 5 C.F.R. 109 § 77.134 (cum. supp. January 1, 1963; now 5 C.F.R. 179 § 771.224). That record included a transcript of the hearing and the report of the *ad hoc* committee. NASA regulation 17-7-30, 9c (6), (7); 11 g, h. This requirement of a full consideration of the entire record is not a pristine formulation unencumbered by prior judicial interpretation; it has a clear meaning which is easily culled from the case authorities. Only recently the Supreme Court had occasion to examine a similar regulation and explain its import. In *Service* v. *Dulles*, 354 U.S. 363 (1957) the State Department regulation under review provided that:

> "The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." at 387. (Emphasis in original omitted.)

The Court commented: "[t]he essential meaning of the section, . . ., was that the Secretary's [of State] decision was required to be on the merits." at 388. In reiterating a fundamental tenet of administrative law the Court added:

> "We do not, of course, imply that the Regulations precluded the Secretary from discharging any individual without *personally* reading the 'complete file' and considering 'all the evidence.' No doubt the Secretary could delegate that duty . . . ." n. 40 at 387. (Emphasis in original.)

Accordingly, what was required of Dr. Seamans was a decision on the merits in the exercise of his discretion; the mechanics by which he reached an understanding of the entire record is not open to appellate scrutiny. Surely the lengthy *ad hoc* committee report was an adequate vehicle to provide him with a clear and accurate understanding of the entire record. In contradistinction, the vitiating error in *Service* v. *Dulles*, *supra*, was not that the Secretary failed to read every word in the appellate record—for he did not have to—but that he failed to make an independent decision on the merits in discharging the employee.

While appellant dwells at length on her first assignment of error (Br. 12-21) it is at bottom without merit; for the precedents are unyielding in their opposition to her claim. *Service* v. *Dulles*, *supra*; *Morgan* v. *United States*, 298 U.S. 468 (1936); *Morgan* v. *United States*, 304 U.S. 1, 18 (1938); *United States* v. *Morgan*, 313 U.S. 409 (1941); *Norris & Hirshberg Inc.* v. *SEC*, 82 U.S. App. D.C. 32, 36, 163 F.2d 689, 693 (1947), *cert. denied*, 333 U.S. 867 (1948); *Bethlehem Steel Co.* v. *NLRB*, 74 App. D.C. 52, 64, 120 F.2d 641, 653 (1941); *Allied Compensation Ins. Co.* v. *Industrial Acc. Comm'n*, 57 Cal. 2d 115, 17 Cal. Rptr. 817, 367 P.2d 409 (1962); *Taub* v. *Pirnie*, 3 N.Y. 2d 188, 165 N.Y.S.2d 1, 144 N.E. 2d 3 (1957); *State* v. *Industrial Comm'n*, 272 Wis. 409, 76 N.W.2d 362 (1956).[3]

---

[3] Although appellant's so-called due process claim (Br. 17-21), is, *a fortiori*, interred by the above-cited cases, we commend for the Court's added consideration: *Snyder* v. *Massachusetts*, 291 U.S. 97, 116, 122 (1934); *Hanna* v. *Larche*, 363 U.S. 420 (1960); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Miller* v. *United States*, 317 U.S. 192, 198 (1942) ("Historically a bill of exceptions

b. Although it is not essential in the instant case, in recognition of the fact that "[a]lternative contentions are the familiar stuff of the law." *Scott* v. *Macy*, No. 18483, June 16, 1965 (Opinion of McGowan J. at slip 9) we alternatively urge that the *de novo* hearing before the Civil Service Commission wiped the slate clean of any prior procedural error committed by Dr. Seamans. *McTiernan* v. *Gronouski*, 337 F.2d 31, 34-35 (2d Cir. 1964).

II. The findings of the Appeals Examining Office, Civil Service Commission, were adequately stated.

The August 6, 1963 decision of the Appeals Examining Office, Civil Service Commission, was required to conform to the following regulation:

> "The decision shall consist of the findings and recommendations, including an analysis of the evidence, the reasons for the conclusions reached, and the action to be taken by the agency." 5 C.F.R. 67 § 22.401(f) (cum. supp. January 1, 1963; now 5 C.F.R. 181 § 772.306.)

Its exhaustive decision (J.A. 65-74), now under attack, substantially complied with the above mandate. The findings were clear, had a rational basis in the evidence and were directly related to the statement of charges contained in Mr. Stoller's letter of December 5, 1962. See *Coleman* v. *Brucker*, 103 U.S. App. D.C. 283, 257 F.2d 661 (1958) (No findings at all.); *Green* v. *Baughman*, 100 U.S. App. D.C. 187, 243 F.2d 610, *cert. denied*, 355 U.S. 819 (1957); *Keyton* v. *Anderson*, 97 U.S. App. D.C. 178, 229 F.2d 519 (1956); *Seebach* v. *Cullen*, 338 F.2d 663 (9th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965); *Pennsylvania R.R. Co.* v. *Department of Pub. Utils.*, 14 N.J. 411, 436, 102 A.2d 618, 631 (1954); *Yellow Cab Co.* v. *Public Util. Hearing Bd.*, 79 R.I. 507, 511, 90 A.2d 726, 728 (1952).

---

does not embody a verbatim transcript of the evidence . . . ."); *Draper* v. *Washington*, 372 U.S. 487, 495 (1963); Fed. R. Civ. P. 75 (n); D.C. Appls. R. 21, 23-25.

The reasons for a "findings" requirement were cogently spelled out by Judge Washington in *Coleman* v. *Brucker*, *supra*; a case wherein none were made at the agency level.

> "The 'findings' . . . are intended to give the employee information that he may use in seeking further consideration by the Security Review Board or by the Secretary of the Army." 103 U.S. App. D.C. at 284-285, 257 F.2d at 662-663.

We think it significant in this regard, that appellant's attorney throughout the administrative proceedings, Mr. Claude Dawson, perceived no paucity of information in the findings now under attack disabling him from pursuing an effective appeal to the Board of Appeals and Review, Civil Service Commission, after the Appeals Examining Office rendered its decision. His brief (Exhibit I in the certified administrative record) and reply brief (Exhibit N) submitted to the Board are strangely silent about the procedural irregularity now pressed. Appellant's present "hue and cry" over this newly discovered "error" (Br. 21-26) thus has the strains of an attempt to exhalt form over substance in her efforts to overturn the administrative apple cart.

III. There was a rational basis in the record to support the conclusions reached by NASA.

Mr. Stoller's letter of December 5, 1962, advised appellant in the opening paragraph:

> "We are proposing your removal because you have falsified official time and attendance reports and fraudulently obtained overtime compensation." (J.A. 51.)

Paragraphs a., c., and accompanying charts specified twenty-one occasions when this occurred. In paragraph d., appellant was charged with revising a time and attendance report to show herself in a duty status on two days she was actually on leave. "The revised time and

attendance report was incorrect, and therefore constituted falsification." (J.A. 52) The letter added:

> "In performing the actions described above, you have committed an offense listed in the 'Table of Disciplinary Offenses and Penalties for Employees in NASA' contained in NASA Management Instruction 17-7-23 entitled 'Discipline'. Specifically, you are guilty of offense number four: 'Falsifying attendance record for oneself or another employee'." (J.A. 52-53).

Appellant has never denied the filing of false reports, her basic defense throughout has been one of confession and avoidance.

> ". . . these were honest mistakes and it was never my intention to deliberately do anything which would result in my profiting improperly at the expense of the government." (Appellant's December 11, 1962, letter of reply to Mr. Stoller.)

The gravamina of the charges contained in paragraphs a. and c. of Mr. Stoller's letter were that appellant *intentionally* falsified her time and attendance cards and thus fraudulently — intending to deceive — obtained overtime compensation.[4] *Cf. Kohlberg* v. *Gray*, 93 U.S. App. D.C. 97, 98, 207 F.2d 35, 36 (1953). Assuming that NASA management established intentional false filings by appellant, her automatic receipt of payment pursuant to each time and attendance report submitted was, *a fortiori*, accomplished fraudulently *i.e.*, with an intent to benefit by her initially wrongful conduct. Obviously, this is the common sense of the matter, "and common sense often makes good law." (*Peak* v. *United States*, 353 U.S. 43, 46 (1957)).

---

[4] Although Appellant's argument II (Br. 26-29) is not aimed with precision, we assume she is following her theory of the complaint filed in District Court, and that the argument is accordingly concerned with the sufficiency of the evidence to support her discharge under paragraphs a. and c. of the Stoller letter. *Cf.* Complaint 8(e) (J.A. 6).

Generally, proofs of other similar acts are so forceful a mode of proving the intent with which one acted on a given occasion—difficult to demonstrate directly—that they are admissible in evidence in criminal cases even though they incidentally reveal other like crimes of the defendant *i.e.*, their probative value outweighs the danger of prejudice. *People* v. *Dales*, 309 N.Y. 97, 127 N.E. 2d 829 (1955) (Intent to defraud in issue.) In the case at bar, evidence of the consistent pattern of so many, concededly, erroneous overtime claims in appellant's favor (See J.A. 20-21, 23-25), yielded a rational basis for the conclusions that she submitted the claims with knowledge of their falsity and, by supplementing her income in this fashion, that appellant thereby "fraudulently obtained overtime compensation." *Eustace* v. *Day*, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962). Thus supported, the decision to discharge her must, of course, stand. *Studemeyer* v. *Macy*, 116 U.S. App. D.C. 120, 321 F.2d 386, *cert. denied*, 375 U.S. 934 (1963).

CONCLUSION

Wherefore, it is prayed that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ARNOLD T. AIKENS,
ALLAN M. PALMER,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 703280 140